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In The

Supreme Court of the United States

October Term, 1982

JAMES C. LaBAR, DONALD J. ROMANOWSKI, LaBAR ENTERPRISES, INC. and LaBAR TRANSPORTATION CORPORATION,

Petitioners.

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the regulations upon which the government's case was premised failed to give notice of what conduct was prohibited, thereby violating petitioners' rights of due process?

2. Whether the petitioners' establishment of an affiliate fuel purchasing company and the seeking of reimbursement from the Postal Service for fuel costs represent a reasonable construction of the Postal Service contract?

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OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Pennsylvania, which was affirmed on appeal, is reported at 521 F.Supp. 203 (M.D.Pa. 1981). A copy of this opinion is printed in the appendix at 4a.

The pre-trial opinion of the United States District Court for the Middle District of Pennsylvania is reported at 506 F.Supp. 1267 (M.D.Pa. 1981).

The judgment order of the United States Court of Appeals for the Third Circuit, affirming the judgment of the United States District Court is not yet reported. A copy of this judgment order is printed in the appendix at 1a.

JURISDICTION

The judgment of the United States District Court of Appeals for the Third Circuit, reprinted in the appendix at 1a, was entered on June 10, 1982. A timely petition for rehearing was denied on July 12, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution:

> Amendment V:
>
> > No person shall . . . be deprived of life, liberty, or property without due process of law . . . .

United States Code, Title 18:

> §371. Conspiracy to commit offense or to defraud United States
>
> > If two or more persons conspire either to commit any offense against the United States, or

to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office of authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be

fined not more than $1,000 or imprisoned not more than five years, or both.

United States Code, Title 39:

§5203. Authorization of service by carrier

• • •

(b) A carrier shall transport mail offered for transportation by the Postal Service in the manner, under the conditions, and with the service prescribed by the Postal Service. A carrier is entitled to receive fair and reasonable compensation for the transportation and service connected therewith.

• • •

(e) No carrier shall be required to serve territory it is not otherwise authorized to serve, to provide service for the Postal Service at a rate which is less than compensatory cost, or to provide service at a detriment to the carrier or its other customers.

• • •

Postal Service Contracting Manual:

19-316.21 Advertised Contracts. Increased costs resulting from changed conditions occurring during the contract term may be compensated for by an increase in the compensation paid under the contract. Decreased costs resulting from such

changed conditions may also be reflected in a reduction in the contract rate, provided the contractor consents. Adjustments made under the subparagraph are limited only to increased or decreased costs directly attributable to changed conditions, except that for changes requiring the use of new capital plant or equipment, the adjustment may include a reasonable percentage return on investment for such new capital plant or equipment. Changed conditions are defined as those brought about by external forces over which the contractor has little, if any control. * * *

STATEMENT OF THE CASE

The present appeal involves a highly unusual criminal case in which petitioners, two individuals and two corporations, have been held criminally liable without notice or fair warning that their activities would be prosecuted by the government and liable for their interpretation of their contract with the Postal Service and associated complex, unique and often ambiguous governmental regulations and guidelines.

This Court has recently accepted for review a number of cases, arising in both the civil and criminal contexts, involving questions regarding the due process sufficiency of notice provided in statutes and governmental regulations. *See, e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, ____ U.S. ____, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); *reh. denied*, ____ U.S. ____, 102 S.Ct. 2023, 72 L.Ed.2d 476 (1982); *City of Mesquite v. Aladdin's Castle, Inc.*, ____ U.S. ____, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). This case presents equally important questions of notice. Postal Service civil regulations carrying no

criminal penalty have been used by the government to prosecute the petitioners.

James C. LaBar began business operating a gas station near Berwick, Pennsylvania 30 years ago. His business subsequently expanded into other areas. In 1968, one of his companies began contracting with the Postal Service for the hauling of mail. Such mail hauling contracts are awarded through competitive bidding, generally for a term of three or four years and covering specified routes. By 1975, LaBar Transportation Corporation ("LaBar Transportation") held approximately 30 mail hauling contracts with the Postal Service, with roughly half of these contracts having been acquired that year. At all times material, LaBar Enterprises, Inc. ("LaBar Enterprises") was the sole shareholder of LaBar Transportation, and Donald J. Romanowski was Vice President and Treasurer of both corporations. By 1977, LaBar Transportation consumed over two million gallons of diesel fuel per year in operating the contracts, and was one of the largest bulk mail contractors in the eastern United States.

In 1980, LaBar, Romanowski, and the two corporations were indicted[1] for conspiracy, mail fraud and false statements.[2] "The government's entire theory of the case was that the defendants sought fuel cost increases to which LaBar Transportation was not entitled under applicable regulations." (34a).[3]

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1. Another individual and a third corporation, Petroleum Suppliers, Inc., were also indicted.

2. The district court entered judgment of acquittal on all false statement counts at trial.

3. *United States v. LaBar*, 521 F.Supp. 203, 219 (M.D.Pa. 1981).

The present Postal Service was created by Public Law 91-375, which became effective January 20, 1971. The enactment placed upon the Postal Service the duty to carry the mails, 39 U.S.C. §5001, and authorized it to obtain mail transportation from private carriers, 39 U.S.C. §5005. Under §5203(b), postal contractors are guaranteed fair and reasonable compensation:

> A carrier shall transport mail offered for transportation by the Postal Service in the manner, under the conditions, and with the service prescribed by the Postal Service. A carrier is entitled to receive fair and reasonable compensation for the transportation and service connected therewith.

Subsection (e) of §5203 expressly provides that no contractor is to carry mail at less than its cost:

> No carrier shall be required . . . to provide service for the Postal Service at a rate which is less than compensatory cost, or to provide service at a detriment to the carrier or its other customers.[4]

The Postal Service guidelines embrace this policy when addressing the basic intent of the relevant statutes affecting Postal Service contracts:

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4. The House report on subsection (e) specifically states that the subsection:

> makes clear that a carrier *may not be required . . . to provide service at less than full cost* or at a detriment to the carrier or its other customers.

1970 U.S. Code Cong. & Admin. News 3686 (emphasis added).

> The law provides that the adjustment of contract pay may be made when *changed conditions* have occurred during the contract term. Changed conditions are those brought about by external forces over which the contractor has *little if any control*. . . . It is the intent of the law that contractors will not be forced into situations which require them to carry mail at a loss. Contractors do have a right to expect a fair return for their work which will permit them proper standard for living.

Regional Instruction, Part 500 Transp., 698-T-140, No. 523, Nov. 21, 1972, §II. A & B. (emphasis added).

The Postal Service's contracts for carriage, which are executed without negotiation or change by the bulk mail contractors, incorporate a large number of boilerplate provisions from the Postal Service Contracting Manual and include a schedule of costs, the so-called "line items" such as insurance costs, fuel costs, labor costs, taxes and depreciation. The Contracting Manual also provides a procedure by which such "line item" costs can be adjusted during the course of a contract by appropriate increases in compensation:

> Increased costs resulting from *changed conditions* occurring during the contract term may be compensated for by an increase in the compensation paid under the contract. Decreased costs resulting from such changed conditions may also be reflected in a reduction in the contract rate, provided the contractor consents. Adjustments made under the subparagraph are limited only to increased or decreased costs directly attributable to changed conditions. . . .*Changed conditions* are defined as those brought about by external forces

> over which the contractor has *little if any control*. . . .

Postal Contracting Manual §19-316.21 (Advertised Contracts) (emphasis added). The district court correctly concluded that the regulations and other directives governing the contractual relationship are crucial to the government's case, and that the case in turn depends largely upon interpreting crucial terms found in the regulations, such as "changed conditions" and "little if any control."

> The court finds the government's attempt to divorce this prosecution from the postal regulations to be unpersuasive. The court in its opinion denying the defendants' pretrial motion to dismiss the indictment [on the ground that the regulations failed to provide fair warning] stated at that time that the indictment charged conspiracy and mail fraud and did not charge defendants with violating Postal Service regulations. *United States v. LaBar*, [506 F.Supp. 1274 (M.D.Pa. 1981)]. At that time, the court, of course, could not know the manner in which the government would attempt to prove its case against defendants. Now that the trial has been completed, the court agrees with the defendants' contention that the phrases "little if any control" are crucial to the government's case. . . .

(33a-34a).[5]

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5. *United States v. LaBar*, 521 F. Supp. 203, 219 (M.D.Pa. 1981).

The procedure for seeking increases for "changed conditions" over which there was little or no control is for the contractor—such as LaBar Transportation—to submit a fuel cost adjustment request. Changed conditions did occur during LaBar Transportation's operation of the Postal contracts: changes caused by the Postal Service itself when it altered the regulations governing the rate of recovery of fuel costs.

Through 1974 LaBar Transportation recovered its actual fuel costs dollar-for-dollar because the Postal Service fully reimbursed actual fuel costs. In 1975 the Postal Service acted directly contrary to Congress' basic intent and denied mail hauling contractors full reimbursement for their actual fuel costs. The Postal Service directed that contractors would be reimbursed only for a fuel cost increase greater than five percent of the existing reimbursement rate.[6] This change occurred just after LaBar Transportation doubled its contractual commitments to the Postal Service.[7]

On July 19, 1975, changing the fuel reimbursement rules just days after final and unchangeable bids had been submitted by

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6. An earlier change, implemented in October of 1974 and limiting fuel cost adjustments according to (usually lesser) increases in the Consumer Price Index, was also a departure from full reimbursement, but its effect on major contractors such as LaBar Transportation was less drastic.

7. In 1975 the Postal Service initiated a system of Bulk Mail Centers, generally located in a central non-urban area in order to draw local mail from a wide area to this non-congested central point. In mid-1975 construction of a large number of these planned Bulk Mail Carriers was completed. In connection with the new centers, the Postal Service let out for bid a large number of new transportation contracts. LaBar Transportation successfully bid on many of these new contracts and in early July 1975, thereby doubled its fuel requirements for bulk mail hauling.

LaBar Transportation on a large number of contracts, the Postal Service established the five-percent threshold criterion for allowable reimbursement of fuel price increases.[8] This approach was instituted by an internal Regional Instruction, not by a change in the Contracting Manual or by amendment of the general provisions of the contracts with the carriers.[9] This meant, for example, that if fuel which had been an average of 50.0 cents a gallon in August 1975 rose to an average of 52.0 cents a gallon in September, an adjustment based upon the 2.0 per cent gallon increase would be automatically denied and never thereafter recovered, since 2.0 cents is less than 5 percent of 50.0 cents. If in December the average price rose a second time by an additional cent to 53.0 cents, the prospective-only adjustment would be allowed, since 3.0 cents is more than 5 percent of 50.0 cents. However, the extra 2.0 cents in costs incurred in September, October and November and the extra 3.0 cents in December would never be recovered.[10] The Postal Service's unilateral decision not to reimburse mail hauling contractors in full for their fuel costs was an adverse change in economic conditions of the first

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8. Regional Instruction, Part 500 Transp. 876-T-158, No. 523, §VII.H.6. In September 1977, the threshold was reduced to 3.5%.

9. Regional Instructions are internal documents governing the Postal Service's negotiations for increased costs with carriers. The Regional Instruction, rather than being used as a *guideline* in negotiations, was universally applied by the Postal Service as a *dispositive rule*. That is, if the five percent standard was met, the increase would be considered, but if it was not met, an adjustment was automatically denied.

10. This approach would hold true for approximately six months, at which point a prospective-only recognition of the cumulative increases could be sought without regard to whether the five percent threshold had been exceeded.

magnitude and a change over which none of the thousands of mail contractors had any control.[11]

Mail contractors became concerned as to how to deal with the adverse impact of the unilateral Postal Service change in fuel cost reimbursement. The device which many major contractors utilized was the creation and operation of subsidiary fuel companies. The use of subsidiary fuel companies had received sanction in 1973 in the form of a Postal Service legal opinion, issued in response to an inquiry concerning a mail hauling contractor having an ownership interest in a corporation from which he was purchasing gasoline at a marked up price of two cents per gallon (86a). The legal opinion, written by an Assistant Regional Counsel, concluded that *the purchase of fuel from an affiliated company was permissible.* For the entire period covered by the indictment, this opinion existed alongside the regulation ostensibly prohibiting cost increases over which a contractor had more than "little or no" or "little if any" control.

Major mail contractors, before and especially after the imposition of a threshold level for fuel cost increase reimbursement, consistently exceed the threshold level and received higher fuel price reimbursements than they would otherwise have been entitled. This was accomplished through the use of subsidiary fuel companies. The purchasing of fuel from a single source, a fuel supplier directly or indirectly affiliated with the carrier,[12] had several advantages for these contractors: (1) the existence of billing procedures which assured that the requisite threshold would be

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11. While the Postal Service has thousands of mail contractors, most operate on modest level and only a relative handful, on the level of a major contractor such as LaBar Transportation.

12. At least nine of the bigger carriers in the East and others throughout the country had controlled fuel subsidiaries.

exceeded in any given billing period, thereby securing reasonably complete fuel cost reimbursement; and (2) the generation of gross profit, and normally net profits as well. This practice was generally understood and accepted by the Postal Service officials with whom the contractors dealt.

The manner in which the Postal Service permitted other major mail hauling contractors to operate with controlled fuel purchasing companies is demonstrated by the preindictment depositions of four contractors, taken by counsel for the appellants and the government and part of the record below. The four mail hauling contractors stated that the Postal Service authorized the establishment of controlled fuel supply companies. Each of the four fuel supply companies was owned by relatives, had common ownership, or were otherwise controlled or affiliated. These four contractors completely controlled prices by marking up fuel prices from five cents to 12 cents per gallon. Included in these mark-ups were as much as eight or nine cents per gallon in profits. All the contractors submitted and received the marked-up prices as their fuel costs in the belief that the Postal Service authorized it and that they were entitled to the compensation claimed. All four stated that the Postal Service was fully aware of the practice, three suggested that the Postal Service had conceded the legality of the practice, and one noted that the Postal Service had even *suggested* the procedure in question. One specifically mentioned the changes in regulations to the five percent threshold level as being the motivating factor in his forming a controlled fuel purchasing company. A second has subsequently confirmed that the use of an affiliated fuel company was essential to recover actual fuel costs.

The obvious conflict between, on the one hand, the Postal Service permitting the practice of affiliated fuel companies marking up prices in response to the conditions changed by the Postal Service and, on the other hand, the vaguely worded Postal Service

regulation seemingly prohibiting cost increases over which a contractor had some undefined measure of control, was never addressed publicly in any official way until the indictment of petitioners.[13] However, in the midst of trial and on February 25, 1981, the Postal Service directed its employees to secure disclosure of "any common interest, supplier/user relationship that they have reason to believe exists before allowing adjustments in contract rates due to fuel costs." (83a-84a). Even then, there was no suggestion that the relationship of a mail contractor with an affiliated fuel company would preclude the granting of fuel cost adjustments. Even then, there was no requirement under applicable regulations or Regional Instructions that a Postal contractor make affirmative disclosure of its relationship with an affiliated fuel supplier. The requirement of affirmative disclosure did not exist until June 5, 1981, more than three months after the verdict in this case.[14]

The petitioners were indicted in the Middle District of Pennsylvania on November 20, 1980, on 21 counts of alleged mail

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13. The regulations, discussed supra, on "changed conditions" and "little or no control" were cited in the indictment. The petitioners are the first and only defendants to be prosecuted under these regulations.

14. On that date, the fuel adjustment request forms were amended by adding the language italicized:

> *I certify the fuel used on this route, totally or in part, was ☐ was not ☐ purchased from a firm in which the contractor has a business interest, i.e., the firm is a subsidiary company, a company owned or controlled by the contractor or a firm in which the contractor is in a position to exercise some management control either directly or indirectly.*
>
> I certify that the above information as stated is accurate and complete to the best of my knowledge, *and reflects the actual cost of the total fuel used on this route during the certified 28-day period.*

fraud under 18 U.S.C. §1341, three counts of false statements to a government agency under 18 U.S.C. §1001, and one count of conspiracy, 18 U.S.C. §371. The jury returned verdicts of guilty on the counts submitted to it. The district court granted motions for judgment of acquittal on all the false statement counts and only guilty verdicts on the mail fraud and conspiracy counts are presently before this Court. LaBar was fined $20,000 and placed on probation for two years. Romanowski was fined $2,500 and placed on probation for two years. LaBar Enterprises and LaBar Transportation were fined $31,000 each. Post-trial motions were denied by the district court on August 14 and September 10, and appeals were taken to the United States Court of Appeals for the Third Circuit, where argument was heard on May 28, 1982. By Judgment Order dated June 10, 1982, the judgment of the district court was affirmed. (1a). A timely petition for rehearing was denied on July 12, 1982. The instant petition to this Court followed.

REASONS FOR GRANTING THE WRIT

The court of appeals in its affirmance of the judgment and opinion of the district court has decided the issue of whether the Postal Service regulations and associated directives give fair warning, as to what conduct the government intended to make criminal, in a manner in conflict with the applicable decisions of this Court. Because the regulations upon which the government's case is premised are impermissibly vague, petitioners' convictions here are violative of due process. Were these convictions allowed to stand, all who engage in government contracting in areas where regulations conflict with approved practices will be subject to criminal jeopardy. The government's resort to criminal prosecution as a means of announcing its construction of the regulations under which the government contracts were operated must be rejected (Section A).

The Postal Service regulations and associated policy statements and directives, constitute the contract under which petitioners operated. Contrary the position of the Fourth Circuit Court of Appeals in *United States v. Race*, 632 F.2d 1114 (1980), the Court of Appeals for the Third Circuit has, in affirming the judgment and opinion of the district court, resolved contractual ambiguity in the government's favor. Interpretations of the contract supportive of petitioners' conduct in this case could not be eliminated. Because petitioners' construction of the contract was a reasonable one, the convictions of the petitioners' must be reversed (Section B).

I.

The regulations upon which the government's case was premised failed to give notice of what conduct was prohibited, and the prosecution was therefore in violation of due process.

The issue here is whether the prosecution of petitioners' for defrauding the government in pursuing fuel cost adjustments under particular Postal Service regulation should have been permitted to proceed, since they were not given fair warning that their conduct would be regarded as criminal. The district court correctly concluded that the "government's entire theory in the case was that the defendants sought fuel cost increases to which LaBar Transportation was not entitled under applicable regulations." (1a). In reaching this conclusion, the district court rejected its own pretrial ruling[15] and also the argument of the government based upon it.

> The government takes the position that even if the applicable postal regulations are vague, the

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15. *United States v. LaBar*, 506 F.Supp. 1267, 1274 (M.D.Pa. 1981).

> defendants can still properly be convicted of conspiracy and mail fraud because the elements of those offenses in the context of this case did not require proof that Postal Service regulations were violated. The government's position is that the jury could have found that the defendants acted in a manner "reasonably calculated to deceive persons of ordinary intelligence and comprehension." *United States v. Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978).
>
> The court finds the government's attempt to divorce this prosecution from the postal regulations to be unpersuasive. The court in its opinion denying the defendants' pre-trial motion to dismiss the indictment on this ground stated at that time that the indictment charged conspiracy and mail fraud and did not charge the defendants with violating Postal Service regulations. *United States v. LaBar*, 506 F.Supp. at 1274. At that time, the court, of course, could not know the manner in which the government would attempt to prove its case against the defendants. Now that the trial has been completed, the court agrees with the defendants' contention that the phrases "little or no control" and "little, if any control" are crucial to the government's case. The government's entire theory of the case was that the defendants sought fuel cost increases to which LaBar Transportation was not entitled under applicable regulations.

(33a-34a).[16] the district court improperly concluded, however, that

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16. *United States v. LaBar*, 521 F.Supp. 203, 218-19 (M.D.Pa. 1981).

the regulations gave petitioners fair warning that criminal sanctions would be imposed if they controlled fuel costs. This error in applying the decisions of this Court was compounded by the district court's apparent delegation of the issue to the jury. Clearly, however, questions pertinent to whether defendants have received fair warning of proscribed conduct is a matter for the court, and not the jury. Since the regulations provide anything but fair warning of prohibited conduct, petitioners' convictions should have been vacated and the indictment dismissed.

The vagueness and ambiguity of the regulations at issue here, correctly described as crucial to the government's case, can be clearly seen by the fact that they are susceptible to at least two different and competing constructions.[17] Petitioners' construction, derived from the 1973 legal opinion and the understanding in the industry, was first voiced in a letter written by the petitioner James C. LaBar to the Postal Service on November 11, 1977. The letter sought reimbursement for the difference between fuel cost increases and the amount allowed under the five percent threshold standard. The letter argued that the five percent criterion was inconsistent with other statutory and regulatory provisions. It referenced the provision of the Postal Manual providing that "changed conditions" are those resulting from circumstances "over which the contractor has little if any control." In essence, the letter advances the first of the two competing constructions, *viz.* that the change in fuel cost reimbursement policy to the five percent threshold criterion was itself a changed condition. Under this construction, the shift to fuel purchases from an affiliated fuel company, caused by the Postal Service's change in fuel cost

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17. The discussion hereafter ignores a further conflict in the applicable provisions of law, potential conflicts resulting from the differing terminology "little or no control", as opposed to "little if any control." Both of these terms appear in the regulations cited *supra*.

reimbursements, did not constitute a violation of Postal Service regulation.

The other and competing construction is, of course, the government's. Its interpretation was advanced in a vacuum, premised entirely upon the isolated actions of the petitioners and ignoring all surrounding circumstances pre-dating the creation of Petroleum Suppliers, Inc. Under the government's construction, the creation of Petroleum Suppliers, Inc. and its affiliation with LaBar Transportation were changed circumstances over which LaBar Enterprises had a measure of control greater than "little or no" or "little if any." The first document in which this construction has been memorialized is the indictment in the instant matter. To construe the regulations in this fashion, however, creates conflict with both the 1973 legal opinion and with the industry-wide practice of creating affiliated fuel suppliers specifically to address the imposition of the five percent fuel reimbursement threshold. This practice was countenanced by the Postal Service itself for years preceding the indictment.[18]

According to a well established principle, applicable to both civil and criminal cases, interpretation of a written contract is a matter of law for the trial court. *Evans v. Wright,* 505 F.2d 287 (4th Cir. 1974); *John McShain, Inc. v. United States,* 462 F.2d 489 (Ct.Cl. 1972); *United States v. Nickel,* 243 F.2d 924

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18. In connection with other arguments advanced in the lower courts, the government has argued that even if and assuming control over an affiliated fuel supplier was permissible, the petitioners' violation of the law results from their failure to disclose the affiliation. However, as previously noted, the district court rejected the argument that conspiracy and mail fraud convictions can be found without "proof that Postal Service regulations were violated," 521 F.Supp. at 218. (33a), and as also previously noted, no regulation required disclosure until more than two and one-half years after the end of the indictment period and more than three months after the verdict.

(10th Cir. 1957). The rule of *contra proferentem*, which requires construction of ambiguous contract clauses against the drafter, should have tipped the district court's scales in favor of appellants' interpretation of these ambiguous contractual and regulatory provisions. *See Sturm v. United States*, 421 F.2d 723, 727 (Ct.Cl. 1970); *Restatement, Contracts*, 236(d) (1932). Here, the district court improperly accepted the government's interpretation of the contract and regulations as reasonable without ever determining the reasonableness of petitioners' construction.[19]

Given the vagueness and ambiguity associated with the regulations and particularly the term "changed conditions," were the petitioners given fair warning by the government as to what conduct it intended to make criminal?

In the entire context of the mail hauling regulations, there was amply justification for proceeding with the creation of a subsidiary fuel supplier and few, if any, circumstances warranting caution in such a plan.

Fundamental principles of due process, as applied in a host of cases decided under the vagueness doctrine, mandate that legislative enactments and administrative regulations give fair warning to affected individuals of what is required of them so that no person is "forced to speculate, at the peril of indictment, whether his conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979); *Grayned v. Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222, 227-28 (1972). *See also, Colautti v. Franklin*, 439 U.S. 379, 390, 99 S.Ct. 675, 58 L.Ed.2d 596, 606 (1979). Thus, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess

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19. *See* Section B *infra*.

at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). Where First Amendment freedoms are not involved and the regulation in question affects purely commercial activity, the test for vagueness is whether a definite course of conduct can be discerned that the regulation forbids. *See United States v. Powell*, 423 U.S. 87, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975) (holding that the mailing of a sawed-off shotgun is within the statute prohibiting the mailing of a "concealable firearm").

The Postal Service regulations and the additional voluminous policy statements, Regional Instructions, and similar materials are of no assistance in determining what is meant by the term "changed conditions," or the terms "little if any" or "little or no" control. The government has been unable to point to any prosecution based, as this one is, upon those provisions. Neither does any document or writing prior to the indictment in this case support the application of these terms here.

Possibly the best evidence of the vague and ambiguous character of the regulations in question is the action taken by the Postal Service to clarify them after the return of this indictment. The Postal Service first issued an internal instruction during the very trial in this case requiring Postal Service officials to secure additional information when, in their judgment, that additional information was required (83a-84a). On June 5, 1981, more than three months *after the verdict* in this case, the government amended the fuel certification form in use by mail contractors, by requiring these contractors to disclose whether fuel purchases were

> from a firm in which the contractor has a business interest, *i.e.* the firm is a subsidiary company, a company owned or controlled by the contractor,

> or a firm which the contractor is in a position to exercise some management control, either directly or indirectly.[20]

For the first time, mail contractors were required to disclose on affiliate relationship.

Statutes using broad and indefinite language, similar to "changed conditions" and "little or no control", have typically been declared void for vagueness. For example, this Court has found unconstitutionally vague: a statute proscribing "any unjust or unreasonable rate or charge" for certain items of necessity, *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516 (1921); a statute requiring, under threat of criminal penalties, payment of "not less than the current rate of per diem wages in the locality where the work is performed," *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926); a statute imposing criminal liability upon one who is "known to be a member of any gang," *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939); an ordinance condemning in expansive terms "vagrancy", *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); and a statute imposing criminal liability on one who "treats contemptuously" the United States flag, *Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974).

The most recent decisions of this Court exemplify its continuing concern with vagueness issues in contexts of both protected and unprotected activity. The circumstances of these cases and the specificity of the statutory and regulatory provisions at issue there stand in sharp contrast with the regulatory provisions involved here.

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20. *See* p. 14, n. 14, *supra*.

In *City of Mesquite v. Aladdin's Castle, Inc.*, ____ U.S. ____, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982), the Court concluded that a regulation in a civil matter requiring an investigation into a licensee's connection with "criminal elements" is not void for vagueness under federal constitutional standards. The Court found that such a connection was merely a factor in, and not determinative of, the decision whether the license application would be approved. This Court noted that its concerns would be heightened considerably were such a standard the basis for a criminal prosecution. 71 L.Ed.2d at 160. Prior to the addition of a detailed definition for the terms "connection with criminal elements," 71 L.Ed.2d at 158 n. 6, those terms were as vague and ambiguous as the terms at issue here.

In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, ____ U.S. ____, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982), *reh. denied*, ____ U.S. ____, 102 S.Ct. 2023, 72 L.Ed.2d 476 (1982), involving a pre-enforcement challenge to a drug paraphernalia ordinance, this Court concluded that the ordinance in question was not unconstitutional. However, in sharp contrast to the circumstances here, operable terms of the ordinance were defined in some detail in associated statutes and the licensing guidelines issued by the municipality. The Court found the activity to involve mere commercial speech (but nonetheless applied a searching analysis), expressed the view that the nature of the penalties imposed bear upon the strictness of the analysis to be applied, and noted that the regulation of "paraphernalia" alone would not provide "much warning" of the nature of the conduct prohibited. 71 L.Ed.2d at 373 n.17. In the instant case, the Court has before it the term "changed conditions", as standardless, ambiguous, and vague as the term "paraphernalia", if not more so. *See also, Ohio v. Young*, 62 Ohio 2d 370, 406 N.E.2d 499 (1980) (statute penalizing those who "facilitate" a criminal syndicate void for vagueness), *cert. denied*, 449 U.S. 905, 101 S.Ct. 281, 66 L.Ed.2d 137 (1980).

Finally, in *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), a statutory standard that, in *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), had been found not to be unconstitutional on its face, subsequently had been given, a majority of the Court concluded, such a broad and vague construction as to violate constitutional safeguards. The statute provided for the imposition of the death penalty on the basis of a conclusion that the acts of the defendant were "outrageously or wantonly vile, horrible or inhuman in that [the acts] involved torture, depravity of the mind or aggravated battery to the victim." Torture and aggravated battery had been explicitly ruled out by the prosecutor, and the Court found no basis to support the conclusion that the murder involved "depravity of the mind" any more or less than other murders. Similarly, were the Court to conclude that the regulations involved here were not facially vague, there can be no question but that all of the surrounding circumstances compel the conclusion that the regulations here are vague and ambiguous as applied.

The district court correctly concluded on the basis of the circumstances of the case that the prosecution of petitioners depended upon a demonstration that Postal Service regulations had been violated. The regulations upon which the prosecution depended are vague and susceptible of several interpretations, providing only the barest support for the government's interpretation, announced for the first time in this prosecution. All prior interpretations viewed the regulations as permitting the establishment of affiliated fuel supply companies. No regulation required disclosure of the affiliation until after trial. Clearly, the regulations upon which the government's case was premised failed to give fair warning of what conduct was prohibited. For this reason petitioners' convictions must be reversed and the indictment, dismissed. The writ should issue so that this Court can review and correct the decision of the court below.

II.

Petitioners' establishment of an affiliate fuel purchasing company and the seeking of reimbursement from the Postal Service for fuel costs represents a reasonable construction of the Postal Service contract.

The common thread of the government's proof was the assertion that certifications for fuel cost adjustments submitted under mail hauling contracts were false and fraudulent, solely because the contractor billed for fuel cost increases which the government now says were not allowed by postal regulations. Specifically, the government's theory was that petitioners "controlled" the amount of their fuel increases in violation of postal regulations. Since only "changed conditions" over which the contractor had little or no control qualified for reimbursement, conditions created by the contractor would not qualify. Proof of this theory in a mail fraud and false statements case required a threshold determination by the district court of the legal meaning of the "contract" in dispute, including applicable statutory and regulatory provisions. Only if the legal review conducted by the court led it to conclude that the fuel cost certifications were not permitted by the contract, could the jury have been allowed to consider them as evidence of fraud. The district court and consequently the court of appeals refused to conclude as a matter of law that petitioners' construction of the contract and postal regulations was a reasonable interpretation. The district court failed to apply the correct legal standard to the evidence—a determination of whether the petitioners' interpretation was unreasonable.

In *United States v. Race*, 632 F.2d 1114 (4th Cir. 1980), the Court of Appeals for the Fourth Circuit held that the district court erred in failing to dismiss as a matter of law charges based on allegedly excessive billings where the submission of such bills was authorized by the terms of the contract. The defendants in *Race*

were indicted for conspiracy and substantive violations of 18 U.S.C. §1001 arising from the submission of "false and fraudulent invoices for payment of services and materials rendered to a division of the Department of the Navy". *Id.* at 1115. The defendants had, *inter alia,* submitted invoices for certain per diem work and other invoices charging a flat 20% as materials handling expense. With respect to the invoices for per diem charges, the government contract provided that per diem would be paid in accordance with the provisions of the Military Joint Travel Regulations (MJTR) for civilians. The appropriate per diem rate, as stated in the regulations, was $33. The defendants' invoices for per diem charges sought $33 for all work done, regardless of the company's actual per diem expenditure. The appropriate construction of the contract was, except in exceptional cases, a matter for the court. *Id.* at 1117. The government interpreted the contract to the effect that the company "was only to be 'reimbursed' for its actual per diem expenditure, subject to a maximum limitation as fixed by the rate to be paid under the MJTR." *Id.* at 1118. The court found that the defendants' interpretation of the contract was a reasonable one, relying in part on prior acceptance of the now questioned procedure, and could not therefore support a prosecution under the conspiracy count or 18 U.S.C. §1001 counts.

In contrast to the Fourth Circuit's decision in *Race,* the Third Circuit, by affirming the judgment and opinion of the district court, incorrectly deferred to the jury on an issue that should have been determined by the court. This error is particularly egregious where the Postal Service fully approved mail hauling contractors controlling their fuel costs by means of a controlled fuel purchasing company. Moreover, practices countenanced, if not encouraged, by the Postal Service coincided with the petitioner's reasonable interpretation of the contract.

To be sure, the petitioners' interpretation of the contract was not the only one. The government took the position that the entry of Petroleum Suppliers, Inc. into the business of supplying fuel to LaBar Transportation was a "changed condition" over which petitioners had absolute control, and hence the government would only recognize the prices paid by Petroleum Suppliers, Inc. in purchasing fuel for LaBar Transportation's use.[21] Thus the government advanced the most narrow, inflexible, and self-serving interpretation to advance its construction of the regulations. However, the government's burden was greater. The government had the burden of negating any reasonable interpretation of the phrase that would make the petitioners' construction factually incorrect. *See United States v. Anderson,* 579 F.2d 455, 459-60 (8th Cir.) *cert. denied,* 439 U.S. 980, 99 S.Ct. 567, 58 L.Ed.2d 651 (1978). *See also United States v. Diogo,* 320 F.2d 898 (2d Cir. 1963).[22]

Petitioners' contrary interpretation of the contract not only predates the government's, it also is based upon the 1973 legal opinion issued by the Postal Service and further is based upon the industry practice. Under this other construction, the term "changed conditions" included the unprecedented economic condition resulting from the Postal Service's refusal to reimburse for actual fuel cost increases, contrary to the Postal Service's statutory duty, the contract, and Congressional intent. Clearly, this interpretation, widely adopted in the industry, was a reasonable one.

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21. The government also recognized that increases to Petroleum Suppliers, Inc. as part of general fuel price increases were also beyond the control of the petitioners.

22. *See also,* discussion, *supra* at p. 20, regarding the doctrine of *contra proferentem.*

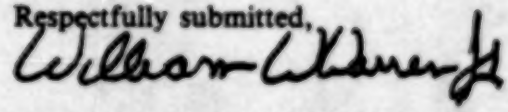
The government's interpretation of the "little or no control" phrase as precluding use of an affiliated fuel supplier is in direct contradiction to the industry practices sanctioned by the Postal Service. On examination, the major mail hauling contractors had considerable control over fuel cost. By purchasing fuel from affiliated fuel companies, these contractors controlled their mark-ups, which were passed on as increases in costs for reimbursement by the Postal Service. These mail hauling contractors with wholly controlled subsidiary or affiliate fuel purchasing companies were given greater than "little or no" control by the Postal Service over mark-ups in their submissions of fuel costs. The sudden, severe economic losses caused by change in reimbursement of fuel costs under the Postal contracts was an economic condition over which little or no control was exercised. Once again, a reasonable construction of the entire contractual relationship established the permissibility of seeking cost adjustments on the basis of price from the affiliated fuel supplier, even while the regulation prohibited reimbursement of costs over which there was some measure of control.

"Changed economic conditions" over which the contractor has "little or no control" is by no means a precise standard, particularly when viewed in the light of conflicting Postal Service practices relating to fuel cost adjustments. Yet these phrases are the very basis of this prosecution. Through the novel implementation of the mail fraud statute, the phrases have become "criminalized", as if they were set forth in Title 18. The fuel cost billings here are supported by a reasonable interpretation of the contract, statute, and regulations. Petitioners' interpretation of the phrase "changed economic conditions" to include contract losses occasioned by the Postal Service's denial of actual cost reimbursement is a reasonable construction. Any ambiguity must be resolved against the government. Judgment of acquittal must be entered in favor of all petitioners on all counts. The writ should issue so that this Court can review and correct the decision of the court below.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to the Court of Appeals for the Third Circuit so that this Honorable Court may review and correct the decision below.

Respectfully submitted,



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APPENDIX

JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JUNE 10, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2740, No. 81-2741
No. 81-2742, No. 81-2743
No. 81-2744, No. 81-2745,
No. 81-2746, No. 81-2747

UNITED STATES OF AMERICA,

v.

JAMES C. LaBAR, DONALD J. ROMANOWSKI, LaBAR ENTERPRISES, INC. and LaBAR TRANSPORTATION CORPORATION,

Appellants

James C. LaBar,
Appellant in Nos. 81-2740, 81-2741

Donald J. Romanowski,
Appellant in Nos. 81-2742, 81-2743

LaBar Enterprises, Inc.,
Appellant in Nos. 81-2744, 81-2745

LaBar Transportation Corp.,
Appellant in Nos. 81-2746, 81-2747

Judgment Order

(D.C. Crim. Nos. 80-00130-01/02/04/05 - M.D.Pa. - Scranton)

Argued May 28, 1982

BEFORE: SEITZ, *Chief Judge,* SLOVITER and BECKER, *Circuit Judges.*

JUDGMENT ORDER

After consideration of the contentions raised by appellants, to-wit, that (1) appellants' prosecution is a product of selective enforcement of federal criminal statutes based upon impermissible criteria and as such is in violation of the first and fifth amendments to the United States Constitution, (2) appellants were permitted, under a reasonable interpretation of the contract, statute, regulations and postal service practices to set up an affiliate fuel purchasing company and to seek reimbursement from the postal service for certain fuel costs, (3) the government's course of conduct concerning affiliated fuel companies estops it from prosecuting these appellants, (4) the regulations upon which the government's case was premised failed to give fair warning of what conduct was prohibited and placed unbridled discretion in the hands of law enforcement officials, (5) appellants' prosecution for mail fraud is prohibited by established principles of statutory constructions, (6) since there was a lack of substantial evidence showing a scheme and intent to defraud, the trial court should have entered a judgment of acquittal on the conspiracy and mail fraud counts and (7) appellants are entitled to a new trial by reason of the existence of an exculpatory regulation published during trial directly pertinent to the prosecution, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Judgment Order

By the Court
s/ Seitz
Chief Judge

ATTEST:

s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: JUN 10 1982

OPINION OF UNITED STATES DISTRICT COURT DATED AUGUST 14, 1981

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Criminal No. 80-00130-01
80-00130-02
80-00130-03
80-00130-04
80-00130-05

UNITED STATES OF AMERICA

vs.

JAMES C. LaBAR, et al.

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Opinion

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OPINION

MUIR, District Judge.

I. Introduction.

On March 2, 1981, a jury convicted each of the Defendants of one count of conspiracy, 18 U.S.C. §371, twenty-one counts of mail fraud, 18 U.S.C. §1341, and two counts of making a false statement to a government agency, 18 U.S.C. §1001. At the close of the Government's case, the Court granted a motion by Petroleum Suppliers, Inc. for judgment of acquittal because the Government failed to prove that any of its officers or agents acted with an intent to benefit it. The Court also granted all the Defendants' motions for judgment of acquittal as to Count 25 because the Court determined that the letter on which that Count was based was not a false statement under 18 U.S.C. §1001. Immediately upon the return of the jury's verdict the Court granted the Defendants' motion for judgment of acquittal as to the two false statement counts.

Opinion

On March 17, 1981, timely motions for judgment of acquittal, a new trial, and in arrest of judgment were filed by the Defendants. On April 3, 1981, the individual defendants were sentenced to fines and suspended terms of imprisonment and fines were imposed on the two corporate defendants. Documents supporting the post trial motions were filed on April 21, 1981 and briefs in support of the motions were filed on May 1, 1981. The Government filed briefs in opposition to the motions on June 5, 1981 and the Defendants filed reply briefs on June 15, 1981. Both sides also submitted additional documents in support of their positions.

On June 4, 1981, the Defendants filed a motion seeking the production of two memoranda from the Government that the Defendants claim are material to their motion for judgment of acquittal. That motion was granted on June 30, 1981 and the parties were given until July 20, 1981 in which to file further briefs which they did. On June 15, 1981, new counsel entered the case for LaBar and further briefing was permitted, which concluded on July 21, 1981 when LaBar filed his last brief. All of the post-trial motions will be denied.

II. Motion for Judgment of Acquittal.

The first of nine grounds asserted in support of the motion for judgment of acquittal is that the Government failed to produce sufficient evidence to sustain the convictions. The Defendants recognize that in ruling on their motion for judgment of acquittal the evidence must be viewed in the light most favorable to the Government, *see* United States vs. Schmidt, 471 F.2d 385, 385-86 (3d Cir. 1972) (per curiam), and that all reasonable and logical inferences in support of the verdicts must be drawn from the evidence. *See* United States v. Trotter, 529 F.2d 806 (3d Cir. 1976). Utilizing that standard of review, the Court must determine

whether the Government presented evidence to support a finding of guilt beyond a reasonable doubt.

Defendant LaBar Transportation Corporation was at the times relevant to the indictment one of the six largest mail hauling contractors in the United States. Among the multitude of statutory and regulatory provisions applicable to postal contractors is 39 U.S.C. §5005(b)(1) which provides that the Postal Service with the consent of the holder of a transportation contract may adjust the compensation allowed under that contract "for increased. . .costs resulting from changed conditions occurring during the term of the contract." The Postal Service has promulgated at least two publications relating to this section. Section 19-316.21 of the Postal Contracting Manual, Government Exhibit 1.01, defines changed conditions as those over which the contractor has "little, if any control." The Postal Service's regional instructions, Government Exhibit 1.02, define changed conditions as those over which the contractor has "little or no control." If a contractor experienced fuel cost increases that met those definitions of changed conditions, and if the increases amounted to 3.5% of the amount previously approved, it could seek on a monthly basis so-called one line adjustments in its contracts to cover those costs. *See* Government Exhibit 1.02. It is these provisions that form the basis for the Government's prosecution of the Defendants.

It was the Government's contention at trial that the Defendants embarked upon a scheme to defraud the Postal Service by submitting to the Postal Service records of fuel purchases by LaBar Transportation that showed prices in excess of the prices actually paid for the fuel. The Government sought to show that this scheme was executed in the following manner: The Defendants agreed in March 1977 to create a corporation to be called Petroleum Suppliers, Inc., whose sole function would be to

purchase diesel fuel from suppliers who had been selling the fuel directly to LaBar Transportation. Petroleum Suppliers would then resell the fuel at increased prices to LaBar Transportation thereby providing LaBar Transpotation with documentary evidence to support its requests for fuel price adjustments under its postal contracts. The Government further sought to prove that the Defendants actively misled the Postal Service as to the relationship between LaBar Transportation and Petroleum Suppliers.

The Defendants have never contended that Petroleum Suppliers was not created by them for the purpose of providing fuel to LaBar Transportation at a cost in excess of the costs LaBar Transportation had previously paid for fuel. They also do not dispute that they used the Petroleum Suppliers invoices to support their requests for fuel price adjustments. What they vehemently contest is that the Government's evidence proved beyond a reasonable doubt that the Defendants acted with an intent to defraud the Government or with an intent to disobey or disregard the law.

From the evidence produced at trial, the jury could reasonably have concluded that Petroleum Suppliers had no legitimate business purpose. The Government's evidence established that Petroleum Suppliers purchased fuel from the same suppliers that had previously sold fuel directly to LaBar Transportation and that it did so on credit terms no more favorable than those available to LaBar Transportation. The only new source of supply used by Petroleum Suppliers was a company in Florida to which Petroleum Suppliers turned after Colonial Oil, the company that had been selling fuel to LaBar Transportation, refused to sell to Petroleum Suppliers because in its view Petroleum Suppliers was not creditworthy. In all cases, fuel was delivered by the primary suppliers directly to LaBar Transportation's trucks or facilities.

Petroleum Suppliers simply received the invoices and billed LaBar Transportation higher prices for the fuel.

Perhaps the most probative evidence of the lack of a legitimate business purpose of Petroleum Suppliers relates to the purchase of fuel with credit cards. Some of the LaBar Transportation drivers were issued credit cards by LaBar Truck Rental, Inc., a sister company to LaBar Transportation and both wholly owned by LaBar Enterprises, Inc. which was wholly owned by LaBar. When these drivers purchased fuel on the road, the purchases were charged using the credit cards and LaBar Truck Rental was billed. LaBar Truck Rental would then send the invoices to Petroleum Suppliers which would pay the invoices and bill LaBar Transportation a higher price for the fuel.

The Defendants, in their cross examination of the Government's witnesses and by certain documentary evidence introduced during the Government's case sought to convince the jury that Petroleum Suppliers had a legitimate business purpose. Among that evidence was testimony by Roger Crockford, Vice-President and General Manager of LaBar Transportation, that Defendant Conner was a "fuel professional" who was able to secure fuel when others could not do so. From this testimony, the Defendants argued that Petroleum Suppliers was a legitimate business because Conner's abilities were available if needed to secure fuel in the event of a recurrence of supply problems that had been experienced by LaBar Transportation in the years preceding 1977. The jury, however, was free to disregard this testimony coming as it did from an interested witness. The jury was also entitled to look at the other evidence in the case and reach the conclusion that Petroleum Suppliers did nothing more than mark up invoices.

From that conclusion, the jury was entitled to draw the further inference that the price increases charged by Petroleum Suppliers had no basis and were designed to secure from LaBar Transportation increased compensation from the Postal Service. Since Petroleum Suppliers did nothing other than receive invoices from fuel oil companies, pay those invoices, and then invoice LaBar Transportation, it was reasonable for the jury to conclude that Petroleum Suppliers had no legitimate reason to charge LaBar Transportation prices in excess of what Petroleum Suppliers paid for the fuel. Since there is no question that Petroleum Suppliers did charge LaBar Transportation more for the fuel than Petroleum Suppliers paid for it, the jury was faced with the task of determining why it did so and why LaBar Transportation paid the invoices or dealt with Petroleum Suppliers at all.

There was evidence, Defendants' Exhibit 4, a letter written by Defendant Romanowski to the corporate attorney for the LaBar companies, that Conner was involved in the discussions with LaBar and Romanowski leading to the formation of Petroleum Suppliers. Defendants' Exhibit 4 also disclosed that the purpose of using Petroleum Suppliers was to increase fuel costs. LaBar Transportation was Petroleum Suppliers' only customer during the period covered by the indictment. In addition, it was Romanowski who directed the Petroleum Suppliers bookkeeper, who was employed by LaBar Enterprises, as to the fuel prices to be charged to LaBar Transportation. Defendants' Exhibit 4 disclosed that the Defendants intended management fees paid by Petroleum Suppliers to LaBar Enterprises and other miscellaneous expenses to offset Petroleum Suppliers' profits. Defendants' Exhibit 25 disclosed that during its first year of business Petroleum Suppliers paid in excess of $82,000 in management fees out of an operating income of approximately $124,000.00. Moreover, the evidence disclosed that all of the fuel suppliers continued to

deal with Romanowski and that Conner was not involved in the procurement of fuel, with the exception of the one case in which a new supplier was needed when Colonial Oil refused to sell to Petroleum Suppliers. From this evidence the jury could conclude that prices charged by Petroleum Suppliers were determined with an eye toward how those prices would benefit LaBar Transportation and LaBar Enterprises in LaBar Transportation's dealings with the Postal Service rather than for any business purpose of Petroleum Suppliers.

Other evidence indicating control by LaBar Transportation over Petroleum Suppliers was the history of payments from LaBar Transportation to Petroleum Suppliers. Government Exhibit 79.01 showed a close correlation between the amount of cash paid by Petroleum Suppliers to its suppliers and the amount of cash paid by LaBar Transportation to Petroleum Suppliers. The Government argued from this evidence that LaBar Transportation's actual outlay of cash to Petroleum Suppliers was just sufficient to permit Petroleum Suppliers to pay its suppliers for fuel and that LaBar Transportation had no intention of ever paying Petroleum Suppliers its mark-up.

The Defendants argued to the jury that what in fact was occurring was the extension of credit from Petroleum Suppliers to LaBar Transportation and that the payment history between the companies showed that for the most part LaBar Transportation's payments were running anywhere from 60 to 105 days behind billings from Petroleum Suppliers. The jury could have rejected this argument because there was testimony that Petroleum Suppliers was obtaining its fuel on the same credit terms that LaBar Transportation had obtained it, namely, payment being required in 10 to 15 days and because Petroleum Suppliers did not appear to be in a financial position to extend credit to LaBar

Transportation. Since LaBar Transportation was paying Petroleum Suppliers amounts that enabled Petroleum Suppliers to pay for its purchases of fuel and since those amounts were essentially equal to what LaBar Transpotation had been paying for fuel prior to the creation of Petroleum Suppliers the jury could have reasonably concluded that the Government's interpretation of the payment history rather than the Defendants' was accurate.

The Court recognizes that this is not the only conclusion that the jury could have drawn from the evidence. There was testimony from Roger Crockford and Daniel T. McHenry, the "Administrator" of LaBar Transportation, to the effect that price negotiations between Crockford and Conner occurred during the summer of 1978. While Crockford and McHenry both testified that such discussions occurred, they placed the discussions at different times of the year. More importantly, by letter dated June 26, 1978, McHenry represented to the Postal Service that LaBar Transportation was paying one price for fuel when in fact it had not paid that price for three months and was then paying less than represented in the letter. Because of these facts and because of these witnesses' obvious ties to the Defendants, the jury could have disbelieved their testimony about Connor setting the prices.

The evidence concerning the formation of Petroleum Suppliers, its purpose, method of operation, and the history of payments to Petroleum Suppliers were sufficient to support the inference that Conner did not set the prices that were charged LaBar Transportation and that no negotiations over prices occurred.

Based on the foregoing, the jury could have concluded beyond a reasonable doubt that the fuel prices charged by Petroleum Suppliers and the requests for fuel adjustments based on those charges were unjustified, that prices charged by Petroleum

Suppliers to LaBar Transportation were determined by the Defendants for the benefit of LaBar Transportation, and that Petroleum Suppliers was controlled by LaBar Transportation and did not operate as a separate entity in its own interests. In short, the jury could reasonably have concluded that Petroleum Suppliers did nothing more than act as the nominal purchaser of diesel fuel, pay for that fuel with funds provided by LaBar Transportation for that purpose and bill LaBar Transportation for fuel at prices set at a level sufficiently high to permit LaBar Transportation immediately to seek increased compensation under its postal contracts. These conclusions alone, however, are not sufficient to support the convictions. The Government was also required to prove beyond a reasonable doubt that the Defendants acted with an intent to defraud the Government or with a bad purpose to disregard or disobey the law.

In its charge to the jury, the Court stated that intent can be inferred from the surrounding circumstances. Among those circumstances was evidence from which the jury could conclude that the entire procedure of increasing the price of diesel fuel by use of Petroleum Suppliers was nothing more than a series of paper transactions, the most blatant of which was the way in which the credit card sales were handled. In an attempt to rebut this inference, the Defendants attempted to bring before the jury advice they claimed to have received from the postal consultant, Travis Henry. One such attempt was Defendants' Exhibit 4, the letter from Romanowski to the attorney, in which it is stated that the decision to establish Petroleum Suppliers was reached after discussions with, among others, Travis Henry. In addition, the Defendants established on cross-examination of the Government's first witness that the Postal Service had no per se prohibition against the purchase of fuel from controlled or subsidiary corporations.

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The obvious intent of this testimony was to convey to the jury that the seemingly unusual method of conducting business used by LaBar Transportation and Petroleum Suppliers was permitted by the Postal Service, or so the Defendants believed. Since the jury was never presented with the substance of the advice allegedly given by Travis Henry, it was not unreasonable for it to afford little weight to the attempt by the Defendants to rebut what was a rather strong inference of intent from the actions taken by the Defendants. There was, however, more evidence of unlawful intent.

The Defendants correctly argue that no Postal Service regulation in effect at the time covered by the indictment required disclosure to the Postal Service of the relationship between LaBar Transportation and Petroleum Suppliers or required any of the Defendants to advise the Postal Service why Petroleum Suppliers was created or how it operated. The Defendants are also correct that there were only two written inquiries from the Postal Service to LaBar concerning these matters. One was a letter dated August 23, 1977, Government Exhibit 25.01, requesting "some explanation" of why LaBar Transportation was buying fuel for a route in Massachusetts from Petroleum Suppliers, a Pennsylvania company. The other was a letter also dated August 23, 1977 but from another postal official, Government Exhibit 4.01, relating that McHenry had not been able to explain why fuel was purchased from Petroleum Suppliers for a route in Massachusetts or if Petroleum Suppliers was a subsidiary of LaBar Transportation. LaBar replied by identical letters dated August 29, 1977, Government Exhibits 4 and 25 stating that the Pennsylvania company, Petroleum Suppliers, was a jobber and not a subsidiary. There were, however, other steps taken to convince the Postal Service that LaBar Transportation enjoyed no special relationship with Petroleum Suppliers.

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On June 26 and July 19, 1978, McHenry, the "Administrator" for LaBar Transportation, wrote Postal Service officials in connection with fuel price adjustment requests. These letters, Government Exhibits 11 and 12, stated in essence that LaBar Transportation had been attempting to negotiate with Petroleum Suppliers for a reduction in fuel prices. As indicated above, because of the discrepancies in McHenry's and Crockford's testimony and the misrepresentation as to the price then being charged by Petroleum Suppliers, the jury could have reasonably concluded that no negotiations took place between LaBar Transportation and Petroleum Suppliers. The jury also could reasonably have concluded that the representations that they had taken place were made for the purpose of leading the Postal Service to believe that LaBar Transportation dealt with Petroleum Suppliers on an arms length basis and had no control over the prices charged LaBar Transportation by Petroleum Suppliers.

There was also evidence from which the jury could have concluded that the Defendants perceived a reason so to convince the Postal Service. Government Exhibit 8 is a letter written by LaBar to the Postal Service in which LaBar quotes a section of the postal manual relating to cost adjustments which recites that adjustments are limited to "increased. . .costs directly attributable to changed conditions. . . ." Changed conditions are defined as those brought about by external forces over which the contractor has "little if any control. . ." That letter is evidence that LaBar knew that increases were not allowable if the price changes were caused by the contractor. The Defendants, therefore, had a very good reason to attempt to convince the Postal Service that they had no control over the prices charged by Petroleum Suppliers.

The knowledge by the Defendants of the Postal Service's position that increased prices caused by the contractor were not subject to increased compensation undercuts the Defendants'

position that they believed in good faith that they could obtain cost adjustments under the circumstances that could have been determined by the jury to have existed, namely, with the Defendants setting the prices charged by Petroleum Suppliers with the view toward the benefit to LaBar Transportation rather than toward any legitimate purpose of Petroleum Suppliers. It further undercuts the Defendants' position that they believed in good faith that they could set up Petroleum Suppliers to do nothing more than write invoices. While evidence to the effect that for a time Petroleum Suppliers and LaBar Transportation had the same mailing address, that both used bookkeeping services provided by LaBar Enterprises and that Petroleum Suppliers' books were not in any way hidden from employees was presented and argued to the jury as evidence that the Defendants lacked an intent to defraud, that evidence was not conclusive and did not offset the other evidence in the case showing unlawful intent.

Having determined that the Government presented sufficient evidence to warrant the jury in concluding that the scheme to defraud alleged in the indictment existed, the Court must now determine whether the Government presented sufficient evidence to link any of the Defendants to that scheme. In order to sustain the convictions, the evidence must be sufficient to show that each defendant had knowledge of the illicit purpose of the scheme and took at least one step in furtherance of that scheme. Evidence of that knowledge must be clear, not equivocal. United States vs. Klein, 515 F.2d 751, 753 (3d Cir. 1975).

Turning first to LaBar, Defendants' Exhibit 4, the letter of March 28, 1977 from defendant Romanowski to the attorney Marshall Jacobson, provides evidence that as of that date LaBar was involved in the decision to establish a fuel company through which LaBar Transportation would purchase its diesel fuel. As outlined in that letter, Petroleum Suppliers would be a subsidiary

of LaBar Enterprises, which in turn was wholly owned by LaBar. The desirability to LaBar of Petroleum Suppliers being a subsidiary is evident from Romanowski's letter as well as from the testimony of Thomas Weir.

The jury could have inferred from the evidence that the purpose of forming a subsidiary fuel corporation was to insure that fuel price increases would exceed 3-1/2% in a given 28 day certification period. The 3-1/2% level was important because until fuel cost increases reached that amount, LaBar Transportation was not entitled to an immediate cost adjustment but would have to bear the increased costs for a period of 28 weeks at which time an adjustment could be requested. Testimony of Thomas Weir, General Manager, Surface Transportation Division, U.S. Postal Service, N.T. Vol. I, at 53, 73, 92. The use of a subsidiary, therefore, would enable the Defendants to reduce the time that LaBar Transportation would have to bear the increased costs of fuel. The use of a subsidiary had another advantage to LaBar.

Postal regulations provided that at most the increased fuel costs would be covered by Postal Service dollar for dollar. Weir testimony, N.T. Vol. I at 57. In other words, if on a given route LaBar Transportation experienced a 10¢ a gallon increase in fuel, the most the Postal Service would reimburse LaBar Transportation would be 10¢ a gallon. In that event, LaBar Transportation would not be making any more money on its postal contracts than if there had been no fuel price increase. Defendants' Exhibit 4 reveals that the Defendants, including LaBar, hoped for an additional benefit by the use of a subsidiary company. The letter recites that "[m]aangement [sic] fees plus other miscellaneous expenses will offset [the subsidiary's] profits." From this the jury could have concluded that LaBar contemplated that in addition to receiving directly from the Postal Service increased compensation because of fuel cost increases, LaBar or one of his companies would receive

additional compensation in the amount of management fees from the subsidiary. In that way, LaBar as sole owner of LaBar Enterprises which in turn was the sole owner of LaBar Transportation would in effect be earning more under the postal contracts than if fuel costs did not increase.

As recounted above, on August 23, 1977, two different officials of the Postal Service wrote to LaBar requesting information concerning Petroleum Suppliers. Government Exhibits 4.01 and 25.01. On August 25, 1977, two days later, Romanowski wrote to Marshall Jacobson to inform him that Petroleum Suppliers would not be owned by LaBar Enterprises and that Robert Conner would be the sole officer. Defendants' Exhibit 6. On August 29, 1977, LaBar sent the two identical letters, Government Exhibits 4 and 25, to the postal officials in which LaBar stated that Petroleum Suppliers was not a subsidiary and that it was being utilized as a fuel jobber to prevent reoccurrences of fuel shortages. On November 11, 1977 LaBar wrote a letter to the Postal Service, Government Exhibit 8, in which he set forth the portion of the Postal Service regulation that provides for cost increases only if they are due to circumstances over which the contractor has "little, if any control."

The jury could have inferred that when LaBar wrote Government Exhibits 4 and 25 he knew of the Postal Service's requirements that cost increases were not allowable if caused completely by the contractor. This inference is supported by the evidence of LaBar's participation in the decision to form Petroleum Suppliers in March 1977 and by the evidence of LaBar's knowledge of postal regulations disclosed by the November 11, 1977 letter to the Postal Service, Government Exhibit 8. The March 28, 1977 letter to Jacobson, Defendants' Exhibit 4, and Weir's testimony concerning fuel cost adjustments permitted the jury to infer that the use of Petroleum Suppliers would be most beneficial to LaBar

if he could be assured that when prices were increased they were increased by more than 3-1/2% at a time and if he could be assured that LaBar Enterprises would be receiving management fees. From this the jury also could have reasonably concluded that the decision to cause the ownership of Petroleum Suppliers to be by someone other than LaBar Enterprises was made to dilute the appearance that LaBar Transportation or LaBar Enterprises exercised control over Petroleum Suppliers, thereby increasing the chances that the Postal Service would approve the fuel cost adjustments.

The jury could infer that LaBar knew of the change in ownership of Petroleum Suppliers because as sole owner of LaBar Enterprises he had an interest in the disposition of a subsidiary that, according to its financial statement, Defendants' Exhibit 25, had a promising future. From these facts, the jury could reasonably have concluded that LaBar permitted the change because he believed it would have no practical effect on the relationship between LaBar Transportation and Petroleum Suppliers; specifically, that LaBar Transportation would be assured that fuel price increases would occur in steps of at least 3-1/2% and that LaBar Enterprises would receive substantial management fees. This was a sufficient basis from which the jury could have reasonably concluded that LaBar was a knowing participant in the scheme proved by the Government.

LaBar's attempt in an affidavit attached to his reply brief filed July 21, 1981 to explain that although he signed Government Exhibits 4, 8 and 25 but did not prepare them is unavailing. The jury was certainly entitled to conclude from the fact that LaBar signed the letters that he wrote them and was aware of their contents. Those letters exhibit LaBar's knowledge of the contracting process and when taken in combination with the nominal divestiture of Petroleum Suppliers provide circumstantial

evidence for the jury's conclusion that LaBar knowingly participated in the scheme.

The evidence with respect to Defendant Romanowski was also sufficient to support the convictions. Romanowski was involved in the day to day operations of both LaBar Transportation and Petroleum Suppliers. Testimony at trial revealed that it was he who supplied the LaBar Enterprises bookkeeper with the prices to be charged LaBar Transportation by Petroleum Suppliers. Romanowski also signed several of the fuel cost adjustment forms. The jury could also reasonably infer that Romanowski was aware of postal regulations regarding cost increases given his position with LaBar Transportation. The jury, therefore, could reasonably have concluded that Romanowski had knowledge that the scheme involved was unlawful and that he knowingly participated in it.

Defendant Conner's situation is similar to that of the defendant Smith in United States vs. Palmeri, 630 F.2d 192 (3d Cir. 1980), *cert. denied,* ____U.S.____101 S.Ct. 1484 (1981). That case involved a scheme to defraud by which certain union officials used their positions to cause union pension funds to buy certificates of deposits from certain banks in return for which the banks made available to the defendants or their nominees unsecured loans with no meaningful evaluations of the loan applications. United States vs. Palmeri, 630 F.2d at 195. The defendant Smith was on the preiphery of the conspiracy; he was a business agent of the union but did not have any control over the pension funds. His role in the scheme was to act as the nominal recipient of certain loans. In affirming his conviction, the Court of Appeals held that Smith's receipt of loans together with his knowledge that he was acting as a nominee for one of the other defendants was sufficient to support the conclusion that he was a knowing participant in the scheme. United States vs. Palmieri, 630 F.2d at 204-05.

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In this case, the evidence was sufficient for the jury to have concluded that Conner was only the nominal owner of Petroleum Suppliers, that he acquiesced in that status and that he was willing to convey to the Postal Service that he was not a nominee but in fact ran Petroleum Suppliers. Since Defendants' Exhibit 4 showed that Conner was involved in the discussions relating to the formation of Petroleum Suppliers, the jury could have inferred that Conner knew that the success of the scheme depended on the Postal Service not learning that LaBar Transportation controlled Petroleum Suppliers. Government Exhibit 10 is a letter signed by Conner to the Postal Service in which Conner states that an invoice of Petroleum Suppliers was correctly billed to LaBar Transportation. The jury was entitled to conclude that in sending that letter Conner knew that it would help create the appearance that the invoice was evidence of a bona fide transaction between independent companies. The jury, therefore, was entitled to conclude that Conner was a knowing participant in the scheme.

LaBar Transportation argues that the Government failed to prove that any actions by its employees were taken with an intent to benefit the corporation and, consequently, the guilty verdicts against LaBar Transportation must be set aside. *See* United States vs. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 205 (3d Cir. 1970), *cert. denied,* 401 U.S. 948 (1971). LaBar Transportation's argument is based on its contention that there could be no benefit to LaBar Transportation under the scheme alleged by the Government because the reimbursement from the Postal Service would never equal the total amount due Petroleum Suppliers for fuel. LaBar Transportation further argues that under the scheme alleged by the Government it was nothing more than "an instrumentality enabling the conspirators to funnel increased revenues to [Petroleum] Suppliers and any other company to which management fees were paid in excess of services rendered." Brief

in Support of Motion of Defendants for Judgment of Acquittal at 42.

The Court rejects this argument as being unfounded. Fuel cost increases were sought on behalf of LaBar Transportation. From this the jury could reasonably have concluded that employees of LaBar Transportation processed the fuel adjustment requests with the intent that they be granted by the Postal Service for the benefit of LaBar Transportation. In addition, while the evidence of payments to Petroleum Suppliers by LaBar Transportation is susceptible of a construction that invoices were paid in full within a 60 to 105 day period, the jury could have concluded that at no time was there an intention on the part of LaBar Transportation to pay in full the ever mounting account due Petroleum Suppliers. Clearly, if the LaBar Transportation payable to Petroleum Suppliers was not intended to be paid, that would be a benefit to LaBar Transportation. Not only were Romanowski and LaBar shown to have been acting within the scope of their authority and in the course of their employment with an intent to benefit LaBar Transportation and LaBar Enterprises, the evidence was sufficient for the jury to have concluded that Daniel McHenry was so acting and that he knowingly misled the Postal Service when he wrote in Government Exhibits 11 and 12 that price negotiations had occurred between Petroleum Suppliers and LaBar Transportation. For these reasons, the Court concludes that the jury could reasonably have found beyond a reasonable doubt that employees of both corporations acted within the scope of their authority and with the intent to benefit the corporation. Consequently, neither corporate Defendant is entitled to a judgment of acquittal.

The Defendants assert in support of their motion for judgment of acquittal that they were the victims of selective prosecution.

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This claim was raised before trial and denied by the Court without a hearing on the ground that the Defendants had failed to adduce credible evidence in support of their contention that others similarly situated were not prosecuted. United States vs. LaBar, 506 F.Supp. 1267, 1272 (M.D. Pa. 1981). In support of their post trial motion, the Defendants argue that the Court improperly made factual determinations without a hearing and that they had produced sufficent evidence to warrant a hearing on their claims. The Court rejects both contentions.

The Defendants argue that the Court improperly determined that there were significant differences between LaBar Transportation and other mail hauling contractors who the Defendants allege were similarly situated. It is the Defendants' position that the only characteristic that is relevant to this case is the purchase of fuel by a mail contractor from a subsidiary or controlled corporation. From this day they argue that the Court's reliance on differences between the business operations of the other fuel companies and Petroleum Suppliers that were evident from the Defendants' submissions in support of their claim of selective prosecution was misplaced.

Despite the arguments by the Defendants, the Court remains unpersuaded that the sole factor to look at to see if others were similarly situated is whether the other mail contractors purchased fuel from subsidiary corporations. At no time has the Government taken the position that such activity is illegal. None of the evidence produced by the Defendants indicates that any of the other mail contractors used essentially paper corporations as vehicles to increase their fuel prices. The Defendants argue that because the Postal Service permitted a mark-up from these other subsidiary corporations to include profit as well as overhead, these subsidiary corporations are situated similarly to Petroleum Suppliers which

the jury could have concluded had no overhead. In addition, Defendants have failed to produce any evidence that any of the other contractors who they claim are similarly situated affirmatively misrepresented the relationship between themselves and their fuel suppliers as the jury could have concluded was done in this case by way of McHenry's letters, Government Exhibits 11 and 12, representing that negotiations were occurring between LaBar Transportation and Petroleum Suppliers. Finally, the Defendants have failed to produce any evidence that other contractors submitted cost adjustment requests knowing they were not entitled thereto.

The conclusion that a hearing is not warranted on the selective prosecution claim is supported by the case of United States vs. Torquato, 602 F.2d 564 (3d Cir. 1979), in which the defendant Democratic county chairman argued that he was the victim of selective prosecution because officials of the Republican Party had engaged in similar conduct and were not prosecuted. The District Court denied the defendant's request for an evidentiary hearing and the Court of Appeals affirmed on the basis that even though payments by persons who contracted with the Pennsylvania Department of Transportation had been made to both Democrats and Republicans, the defendant failed to produce any evidence showing that the payments made to the Republicans were coerced. United States vs. Torquato, 602 F.2d at 570 and n. 12. For that reason the defendant was not similarly situated to the Republican party officials. United States vs. Torquato, 602 F.2d at 571. Similarly, the existence of contractors who purchased fuel from subsidiaries is not sufficient to warrant a hearing on the Defendants' claim of selective prosecution when the Defendants have produced no evidence that these other contractors manipulated the fuel supply companies as the Government alleged and proved the Defendants did in this case.

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As the result of the Court's June 30, 1981 discovery order, the Defendants obtained from the Government two memoranda written by postal officials in February and March of 1978. The Court's conclusion that the Defendants are not entitled to a hearing on their claim of selection prosecution is not altered by those memoranda. Those communications show only that in considering requests for fuel price adjustments, a major concern to the Postal Service was whether the price paid by the contractor was competitive. The memoranda show that LaBar Transportation and another contractor submitted requests for fuel cost adjustments that the local postal official thought were based on prices that were not competitive. The memoranda do not shed any light on the crucial issue of whether any other contractor sought fuel costs adjustments knowing that it had exercised complete control over the price it paid for fuel. The memoranda, therefore, do not constitute evidence that other contractors were similarly situated to the Defendants.

By letter dated July 8, 1981, LaBar Enterprises and LaBar Transportation raise an additional argument in support of their contention that the Defendants are the victims of selective prosecution. The argument is based on the following chronology. According to an affidavit submitted by LaBar, he met in Washington with Congressmen Jim Wright and Sam Hall on April 26, 1978 to request a G.A.O. investigation into postal contracting matters. On May 16, 1978, the two Congressmen made such a request in writing to the Comptroller General stating that they had received complaints "by contract highway mail haulers" that the Postal Service "may be putting improper pressure on mail contractors resulting in their being forced to carry mail at a loss, contrary to law." The final piece of evidence on this issue is that according to LaBar postal inspectors began their investigation in approximately August 1978. From this, the Defendants argue that they have presented sufficient evidence to warrant a hearing on

their claim that Postal Service instituted its investigation of the Defendants in retaliation for the Defendants having asked two Congressmen to request the G.A.O. to investigate the Postal Service.

The problem with the Defendants' argument, however, is that they have failed to call to the Court's attention any competent evidence that the Postal Service was aware of LaBar's request to the Congressmen for an investigation, or that the Congressmen's letter was written because of LaBar's meeting or that the G.A.O. in fact began an investigation. In the absence of any evidence showing a causal link between the Congressmen's letter to the G.A.O. and the postal inspectors' decision to investigate the Defendants, the Defendants have failed to satisfy the threshhold requirement for an evidentiary hearing on their claim.

The unique nature of fraud prosecutions requires careful scrutiny of selective prosecution claims. It is not uncommon for a fraudulent scheme closely to mirror a legitimate business operation. In fact, the more closely a fraudulent scheme resembles a legitimate one, the greater the chances of success to the schemers. These Defendants have been charged and convicted of defrauding the government by use of a scheme that involved apparently legitimate business dealings. To obtain a hearing on a claim of selective prosecution the Defendants must do more than come forward with evidence that others have legitimately used the same business forms in their dealings with the Postal Service. It bears note that unlike the usual selective prosecution claim in which the defendant argues that others who have committed the crime for which he is charged have not been prosecuted, these Defendants at no time have contended that the contractors who they claim are similarly situated violated the law. In short, the Defendants have to date produced evidence that shows nothing more than

that other mail hauling contractors purchased fuel from subsidiaries. That showing is insufficient to require a hearing.

The Defendants also take issue with the Court's determination that the internal divisions of the Postal Service prevented any alleged animosity on the part of personnel in the mail processing department from infecting the postal inspection service's investigation into the Defendants' conduct. The Defendants do not dispute that such a division of functions exists, but argue that a hearing is required to determine whether in fact the separation of functions are observed in this case. This argument misconstrues the burden of the respective parties as to this issue.

In opposition to the Defendants' pre-trial motion raising the claim of selective prosecution, the Government submitted affidavits which showed that this investigation was handled routinely, that the decision to investigate was made by the postal inspection service and, more importantly, that the decision to seek a grand jury indictment was made solely by the United States Attorney. To date the Defendants have presented no evidence to contradict these assertions. In United States vs. Erne, 576 F.2d 212, 216-17 (9th Cir. 1978), the Court of Appeals for the Ninth Circuit held that a separation of functions employed by the Internal Revenue Service similar to that used by the Postal Service was sufficient to remove any taint that might have existed in other branches of the service. Similarly in this case, even if the initial request for investigation to the Postal inspection service was motivated by improper reasons, the autonomy of the postal inspection service and of the United States Attorney uncontradicted by the Defendants, makes any taint immaterial.

For these reasons, the Court declines to hold an evidentiary hearing on the claim of selective prosecution and will not enter

judgments of acquittal on the basis that the Defendants are victims of selective prosecution.

The Defendants argue that they are entitled to judgment of acquittal because their actions were reasonable under the Postal Service contracts and regulations and as such cannot form the basis for a prosecution to defraud the Government. The Defendants argue with respect to fuel price increases that all the contracts and postal regulations required was a certificate showing a statement of the names and locations of suppliers of fuel and the average price paid per gallon during the prior month. The Defendants contend that the certifications supplied with respect to purchases from Petroleum Suppliers met that requirement. In addition, the Defendants contend that when asked by Postal Service officials for "some explanation" of the request for adjudgment, Government Exhibit 25.01, LaBar wrote explaining that LaBar Transportation was using a fuel jobber which was not a subsidiary. Government's Exhibit 25. In dismissing Count 25 of the indictment, the Court found as a matter of law that LaBar's letter was not a false statement within the meaning of 18 U.S.C. §1001 because Petroleum Suppliers was not at the time of the letter a subsidiary. The Defendants argue from this that since they supplied a certification as required by the Postal Service and provided an explanation that was not a false statement they are entitled to acquittal on the remaining counts charging conspiracy and mail fraud.

This argument is based primarily on the case of United States vs. Race, 632 F.2d 1114 (4th Cir. 1980), which involved conspiracy as well as false statement charges. The opinion in that case, however, deals exclusively with the false statement charges and does not address the conspiracy charge. That case, therefore, is of limited value to a determination of whether conduct including

statements that are not false statements under 18 U.S.C. §1001 may properly form the basis for conspiracy and mail fraud convictions.

The Defendants' argument in this regard requires the Court to conclude as a matter of law that the fuel certifications submitted by LaBar Transportation were bona fide. There was, however, ample evidence from which the jury could have concluded that prices charged by Petroleum Suppliers were determined by LaBar Transportation, that such prices were never in fact paid by LaBar Transportation and for that reason the certifications were not bona fide. This case is not like the situation in *Race* in which the Court of Appeals held that the defendant's interpretation of the applicable contractual provisions was reasonable and for that reason the statements presented to the Government were not false. United States vs. Race, 632 F.2d at 1119.

The Defendants support their argument that their interpretation of postal regulations was reasonable by relying on the two memoranda exchanged between the Jacksonville, Florida Transportation Management Office (TMO) and the regional office of the logistic division of the Postal Service that the Defendants obtained as a result of the Court's June 30, 1981 discovery order. The Defendants argue that since the Jacksonville TMO was unsure as to how to process LaBar's request for a fuel increase, the Defendants cannot be prosecuted because they submitted fuel price increases in excess of the market price. The flaw in this argument is that it rests on the false premise that the Defendants were prosecuted for submitting fuel certifications showing that they purchased fuel for prices in excess of the market price. The Government's attempt to show that the prices certified by LaBar Transportation were in excess of the market price was precluded when the Court sustained the Defendants' objection to such evidence. The basis of the Government's charge against the

Defendants is that contrary to Postal Service regulations, LaBar Transportation sought fuel price increases when it controlled those increases and that the Defendants caused LaBar Transportation to do so knowing that the conduct was in violation of applicable Postal Service regulations.

The Court rejects the Defendants' attempt to construe the two memoranda as establishing as the Postal Service's complete policy on cost increases the requirement that they be based on competitive prices. While the competitiveness of prices is one factor that the Postal Service considers when determining whether to permit fuel costs adjustment, it is not the only factor. Postal regulations clearly provide that cost increases are not available if they are brought about by circumstances within the contractor's complete control. The evidence presented in this case prevents the Court from concluding as a matter of law that the Defendants' conduct as it could have been found by the jury was a reasonable interpretation of postal regulations because that evidence supports the conclusion that LaBar Transportation exercised complete control over the prices charged by Petroleum Suppliers. Moreover, the Court cannot conclude as a matter of law that it was a reasonable interpretation of Postal Service regulations for the Defendants to have concluded that they could cause Petroleum Suppliers to set its prices at levels high enough to permit LaBar Transportation to seek immediate cost adjustments from the Postal Service. Since the evidence did not permit the Court to conclude as a matter of law that the fuel adjustment requests complied with applicable regulations, the case properly was submitted to the jury and the jury could properly have rejected the Defendants' argument that the Defendants believed their conduct was permissible.

The Defendants next argue that they were affirmatively misled by the Postal Service into believing that their conduct was proper.

They argue that there was a long-standing practice of the Postal Service authorizing mail haulers to purchase fuel from subsidiaries and that there was no regulation requiring disclosure of such purchasers. Under this state of affairs, the defendants argue they could not reasonably have expected that their actions would be grounds for prosecution. The Defendants rest this argument on the cases of United States vs. Pennsylvania Industrial Chemical Corp., 411 U.S. 655 (1973), and United States vs. Insco, 496 F.2d 204 (5th Cir. 1974). Neither those cases nor the evidence of record supports the Defendants' position.

As indicated above, the Defendants did not present any evidence as to what advice they received from Travis Henry or others concerning the legality of their plan. In United States vs. Pennsylvania Industrial Chemical Corp., 411 U.S. at 673-75, the case was remanded in order to give the defendant an opportunity to present evidence of its reasonable reliance on certain regulations promulgated by the Army Corps of Engineers. In this case, the Defendants were not prohibited from attempting to show reliance on Postal Service practice or expert advice; instead, they chose for tactical reasons not to present such evidence.

United States vs. Insco involved a prosecution under 18 U.S.C. §612 which requires political candidates to affix attribution clauses to campaign materials. The defendant in that case was charged with failing to have done so with respect to bumper stickers. The indictment was dismissed on the ground that the statute was inartfully drawn and did not give fair warning that the conduct was illegal. This lack of fair warning was increased by the fact that there had been no prosecutions for the practice for 29 years and that the lack of attribution clauses on bumper stickers was "a universally accepted omissive practice among federal candidates." United States vs. Insco, 496 F.2d at 209.

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The conspiracy and mail fraud statutes involved in this case, however, are not subject to the same attacks. While the Defendants' reliance on advice and what they thought other contractors were doing would have been probative on the issue of good faith, no such evidence was offered. In addition, there was no evidence that the Postal Service affirmatively misled the Defendants into believing that they could engage in the conduct disclosed by the evidence which included the use of a shell corporation to generate marked up invoices and then affirmatively to mislead the Postal Service as to the relationship between LaBar Transportation and Petroleum Suppliers.

In their reply brief the Defendants request a hearing to show that their reliance on alleged Postal Services practices was reasonable and a ground to prevent their prosecution. A hearing at this stage of the proceedings is not appropriate. The Court rejects the Defendants' attempt to divorce this issue from those that were the proper subject of the jury's determination and to have the Court now hear their defense. Stripped to its core, the Defendants' argument is that they believed what they were doing was legal. Evidence on that issue could properly have been presented to the jury but the Defendants chose not to do so.

United States vs. *Insco* is not to the contrary. While it is true that in *Insco* the Court of Appeals dismissed the indictment for the reasons stated above, it observed that the case involved "extraordinary facts, unlikely of repetition in other contexts. . . ." United States vs. Insco, 496 F.2d at 209. The Defendants have failed to show that this case presents factual circumstances so similar to *Insco* as to warrant the dismissal of the indictment.

The Defendants next argue that the convictions must be set aside because they are offensive to the due process clause of the Fifth Amendment since the regulations upon which the

Government's case was based failed to give the Defendants fair warning of what was prohibited and placed unbridled discretion in the hands of law enforcement officials. It is the Defendants' position that the postal regulations involved in this case permitted fuel price increases only if they were attributable to external forces over which the contractor had "little, if any control." Postal Contracting Manual, §19-316.21, Government Exhibit 1.01, or from "economic conditions" over which the contractor had "little or no control." Regional Instructions, Part 500 Transportation, 100?-T-164 Filing No. 523, Sept. 27, 1977, §IIB, Government Exhibit 1.02. It is the Defendants' contention that the Government's fraud theory is that the Defendants falsely and fraudulently represented to the Government that the fuel price increases were proper under postal regulations and that the increased prices were brought about by circumstances over which LaBar Transportation had "little, if any control" or "little or no control." Defendants argue from this that the phrases "little, if any control" and "little or no control" are too vague to provide the Defendants with notice of what degree of control over prices they could properly exercise.

The Government takes the position that even if the applicable postal regulations are vague, the Defendants can still properly be convicted of conspiracy and mail fraud because the elements of those offenses in the context of this case did not require proof that Postal Service regulations were violated. The Government's position is that the jury could have found that the Defendants acted in a manner "reasonably calculated to deceive persons of ordinary intelligence and comprehension." United States vs. Pearlstein, 576 F.2d 531, 535 (3d Cir. 1978).

The Court finds the Government's attempt to divorce this prosecution from the postal regulations to be unpersuasive. The Court in its opinion denying the Defendants' pre-trial motion to

dismiss the indictment on this ground stated at that time that the indictment charged conspiracy and mail fraud and did not charge the Defendants with violating Postal Service regulations. United States vs. LaBar, 506 F.Supp. at 1274. At that time, the Court, of course, could not know the manner in which the Government would attempt to prove its case against the Defendants. Now that the trial has been completed, the Court agrees with the Defendants' contention that the phrases "little or no control" and " little, if any control" are crucial to the Government's case. The Government's entire theory of the case was that the Defendants sought fuel cost increases to which LaBar Transportation was not entitled under applicable regulations.

Having concluded that the postal regulations relating to price increases were crucial to the Government's case, the Court will confront the Defendant's vagueness argument. In a case such as this that involves no First Amendment freedoms, the Defendants' vagueness challenge must be determined in the light of the facts of the case. United States vs. Powell, 423 U.S. 87, 92 (1975). A statute regulating commercial activity is unconstitutionally vague if it "proscribes no comprehensible course of conduct at all." United States vs. Powell, 423 U.S. at 92.

Such a statute was in issue in United States vs. Cohen Grocery Co., 255 U.S. 81, 89 (1921). That statute prohibited anyone from "willfully. . .make[ing] any unjust or unreasonable rate or charge in. . .dealing in or with any necessaries. . ." In explaining the Court's finding of unconstitutionality in the *Cohen* case, the Supreme Court in *Powell* explained that:

> [t]he sugar dealer in *Cohen*. . .could have had no idea in advance what an "unreasonable rate" would be because that would have been determined

> by the vagaries of supply and demand, factors over which he had no control.

United States vs. Powell, 423 U.S. at 92-93.

In *Powell, Cohen* was contrasted to the case of Sproles vs. Binford, 286 U.S. 374, 393 (1932), in which a vagueness challenge to a statute providing that certain oversize loads must be transported by the "shortest practicable route" was rejected. In that case, the Court found that the carrier had been given "clear notice that a reasonably ascertainable standard of conduct [was] mandated; it [was] for him to insure that his actions [did] not fall outside the legal limits." United States vs. Powell, 423 U.S. at 92.

In *Powell* itself, the Supreme Court held that 18 U.S.C. §1715, which proscribed the mailing of any "firearm capable of being concealed on the person", was not unconstitutionally vague when applied to a case involving the mailing of a 22-inch-long sawed off shotgun. United States vs. Powell, 423 U.S. at 93.

The Court concludes that regulations at issue in this case are closer to the statutes at issue in *Powell* and *Sproles* than they are to the statute condemned in *Cohen*. The regulations in issue fairly apprise postal contractors that they may not seek cost adjustments when their costs have been increased by their own actions. "While doubts as to the applicability of the language in marginal fact situations may be conceived, we think that the [regulations] gave [the Defendants] adequate warning" that their attempt to seek fuel price adjustments under circumstances in which a jury could find beyond a reasonable doubt that they exercised complete control over those prices was unlawful. *See* United States vs. Powell, 423 U.S. at 93.

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It bears emphasizing that at no time did the Defendants seek to argue to the jury that they failed to understand the meaning of "little, if any control" or "little or no control." The Supreme Court has recognized that such misunderstandings are proper to bring before the jury in a case, such as this, that requires a knowing violation of the law. *See* Bryson vs. United States, 396 U.S. 64, 69 (1969). Further, the Defendants did not request of the Court an instruction to the jury as to the meaning of the phrases "little, if any control" or "little or no control." The requirement that the Government prove beyond a reasonable doubt that the Defendants acted knowingly also does much to undercut the Defendants' vagueness argument. *See* Colautti vs. Franklin, ____U.S.____, 99 S.Ct. 675, 685 & n.13 (1979). For these reasons, the Court concludes that the postal regulations at issue fairly apprised these Defendants that the conduct they engaged in was unlawful and that their prosecution and conviction were not the result of unbridled prosecutorial discretion.

The Defendants, relying on United States vs. Tarnopol, 561 F.2d 466 (3d Cir. 1977), argue that the individual mailings alleged in counts 2 through 22 of the indictment were not sufficiently related to the alleged mail fraud scheme to support the mail fraud convictions. It is the Defendants' position that the mailing of the fuel cost adjustment forms and supporting documentation alleged in counts 2, 3, 5, 6, 7, and 9 were routine communications intrinsically innocent and required by law to have been made to the Postal Service. The Defendants do not address the other mailings alleged and proved in the case such as the letters relating to the fuel price increases alleged in Counts 4, 8, 10, 11 and 12 or any of the checks received by LaBar Transportation, the mailings of which are alleged in counts 13 through 22. The Court finds the Defendants' reliance on Tarnopol misplaced as to the fuel adjustment requests and certifications and finds the case inapplicable to the other mailings alleged and proved in this case.

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Tarnopol involved a scheme to defraud whereby the defendants, record company executives, failed to record on the books of their companies the proceeds of certain cash sales of records and used the cash accumulated as a slush fund out of which to pay disc jockeys and radio program directors in order to induce them to play the companies' records. The records involved were actually produced by a third corporation which also filled orders for the records. Upon filling the orders, a copy of the packing slip was sent to the companies owned by the defendants. In the instances of sales for other than cash, the defendants routed the packing slips in the normal course to the bookkeeper who made the appropriate entries in the books. The packing slips generated by cash sales were retained by the Defendants, thereby preventing those sales from being recorded in the companies' books.

In holding that the mailings of the packing slips were not sufficiently related to the defendants' scheme to defraud, the Court of Appeals noted that the mailings were initiated by a third party, not the defendants, and that each mailing took place before the first action was taken to execute the fraud. United States vs. Tarnopol, 561 F.2d at 473. In this case, however, the mailing of the fuel adjustment requests were initiated by the Defendants in their attempt to secure additional compensation from the Postal Service. Moreover, each mailing arose after the scheme to defraud had been put into operation. Finally, far from being only a convenience to the Defendants, as the Court of Appeals determined the use of the packing slips was to the defendants in *Tarnopol,* fuel certifications were an essential element in the Defendants' scheme in that they served as the basis for the increased compensation and the fact that the Postal Service required those forms in order to process the requests does not remove their mailing from the impact of the mail fraud statute.

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The Defendants do not contend that the letters referred to in Counts 4, 8, 10, 11 and 12 were routine mailings required by the Postal Service. Each of those letters in some way conveyed to the Postal Service the impression that LaBar Transportation was dealing with Petroleum Suppliers at arms length and that LaBar Transportation was indeed entitled to fuel cost adjustments it sought. These letters, therefore, could reasonably have been found by the jury to have been mailed in furtherance of the scheme to defraud.

The same observation applies with respect to the checks referred to in Counts 13 through 22. Each of those checks represented compensation including fuel price adjustments. It defies logic to argue that mailings by the victim to the Defendants of the proceeds of the scheme to defraud are not mailings in furtherance of that scheme.

The Defendants contend that they are entitled to acquittal because the opening statement delivered by the prosecutor failed to mention that the Government would prove that the venue for each crime lay in this district. The Defendants do not argue that the evidence was insufficient to support such a finding. They cite no case in support of their contention that in an opening statement the Government must tell the jury that it will prove each element of the crime. What case law there is on the subject is to the contrary.

The Courts have approved a procedure whereby a prosecutor waives his opening statement. United States vs. Holland, 526 F.2d 284, 285 (5th Cir. 1976), and situations in which the prosecutor has failed to advise the jury what Florida law forms the underlying illegality that was allegedly promoted in a prosecution under the Travel Act, 18 U.S.C. §1952. Hanley vs. United States, 416 F.2d 1160, 1164 (5th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).

Moreover, there is no requirement that the prosecutor's opening statement include a recital of the evidence he intends to rely on or that he state a prima facie case in his opening. United States vs. Levine, 372 F.2d 70, 73 (7th Cir.), *cert. denied,* 388 U.S. 916 (1967); Chatman vs. United States, 557 F.2d 147, 149 (8th Cir.), *cert. denied,* 434 U.S. 863 (1977). While it appears that the Court has the power to dismiss the indictment if the prosecutor's opening is insufficient, Hanley vs. United States, 416 F.2d at 1164, the Court rejects the Defendants' contention that it is obliged to order their acquittal because of the Government's failure specifically to say in its opening that it would prove that venue is proper in this district.

The Defendants' final argument in support of their motion for judgment of acquittal is that since the fuel cost adjustment forms provided by the Postal Service state that failure to answer truthfully may give rise to prosecution under 18 U.S.C. §1001, the Government is barred from prosecuting these defendants under the mail fraud statute. This claim was raised in the Defendants' pre-trial motion and rejected at that time by the Court, United States vs. LaBar, 506 F.Supp. 1267, 1274-75 (M.D. Pa. 1981), and the Court rejects it at this time for the same reasons.

III. Motion for New Trial.

Having determined that the Defendants are not entitled to the entry of judgments of acquittal, the Court will now turn to their motion for a new trial. In support of that motion, the Defendants argue that the Court made three evidentiary errors, improperly prohibited the Defendants from using certain charts during closing argument and that the prosecutor's rebuttal argument was unfair and requires a new trial. The Court concludes that none of its rulings was erroneous, did not result in unfair

prejudice to the Defendants, and does not require a new trial. In addition, the Court concludes that the prosecutor's closing remarks were proper and are not a ground for a new trial.

The Defendants argue that the admission of the Government Exhibits 39 and 41 was improper under Fed.R.Evid. 403 because the probative value of those exhibits was substantially outweighed by the danger of unfair prejudice to the Defendants and that the prejudice suffered was such that a new trial is required.

Government Exhibits 39 and 41 are documents prepared by Colonial Fuel Oil Company in response to a letter and phone calls from Defendant Romanowski that his name be removed from invoices and that the invoices be sent to Petroleum Suppliers and not to LaBar Transportation. It was the Government's position that this evidence was relevant because it tended to show that Romanowski wanted to make it appear that he had no connection with Petroleum Suppliers. The reason for this wish, according to the Government, was the Defendants' awareness of the Postal Service's practice of investigating fuel cost increases resulting from purchases from a subsidiary or a controlled corporation more closely than other fuel adjustment requests. Part of this intensified scrutiny included checking with the companies who sold fuel to the contractor's supplier.

The Defendants argue that this evidence was cumulative because Government Exhibit 38, a letter written to Colonial Oil by Romanowski, instructs Colonial to "eliminate" Romanowski's name and Walter Nickelson, sales manager of Colonial Oil, testified at trial that Romanowski had told him to remove Romanowski's name from the invoices. The Defendants argue that the admission of Exhibits 39 and 41 was prejudicial because they contain the word "delete" which the Defendants argue has a more urgent connotation than the word "eliminate" used by Romanowski in his letter to Nickelson, Government Exhibit 38.

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The Court does not view the admission of Exhibits 39 and 41 to have been "needless presentation of cumulative evidence", Fed. R.Evid. 403, but properly admissible to show that Colonial took steps to comply with Romanowski's request and that Romanowski made the request at least twice. In addition, the Court does not see any significant difference between the word "eliminate," used by Romanowski in Government Exhibit 38, and the word "delete" used by Colonial Oil and for that reason rejects the Defendants' claim that they were prejudiced by the admission of Government Exhibits 39 and 41. The admission of Government's Exhibits 39 and 41 was not, therefore, error and not a ground for a new trial.

The Defendants' next argument with respect to the admission of evidence relates to testimony concerning the Government Exhibit 11, a letter from Daniel T. McHenry to the Postal Service concerning a request for a fuel adjustment. That letter stated that LaBar Transportation had "task [sic] ourselves to negotiate with Petroleum Suppliers a reduction in rate. . ." and that LaBar Transportation was then paying 66.9¢ per gallon for fuel. The Defendants objected to the inquiry concerning the representation of the current price charged by Petroleum Suppliers on the ground that its probative value was substantially outweighed by its prejudicial impact and because it was not part of the scheme charged in the indictment. The Court, after reviewing the indictment and the bill of particulars filed by the Government, overruled the objections and permitted the testimony.

The Government Exhibit 11 can fairly be said to contain two alleged misrepresentations, the first relating to negotiations between LaBar Transportation and Petroleum Suppliers and the second relating to the then present price being paid by LaBar Transportation for fuel. It was the second representation that the

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Defendants objected to. Among other allegations, the indictment alleges on page 8, ¶2, that "the Defendants. . .did prepare and disseminate. . .by use of the mails, materially false and misleading information to the U.S. Postal Service. . . alleging that through the period from July 1, 1977 through December 31, 1978, LaBar Transportation Corporation was charged higher prices per gallon for diesel fuel to operate its Postal Service contracts than it actually was being charged." The Defendants were thereby put on notice that among the false representations allegedly made were ones relating to the amount actually being charged for fuel. Moreover, page 3 of the Government's bill of particulars states that "Government's Exhibits 11 and 12 are additionally false in that the so-called 'negotiations' were a sham because LaBar Transportation Corporation had not been billed by Petroleum Suppliers, Inc. at a rate of 66.9¢ per gallon since March of 1978. . . ." The Court, therefore, was correct in its conclusion that a misrepresentation with respect to the then current price was alleged in the indictment and that the Defendants had adequate notice that the Government would attempt to prove such a misrepresentation. For that reason, the admission of the testimony relating to that aspect of Government Exhibit 11 was proper and not a ground for a new trial.

The Defendants also argue that the admission into evidence of Government Exhibit 79.01 was error requiring a new trial. That exhibit, a portion of which is reproduced below, was a schedule showing the amount paid to primary suppliers by Petroleum Suppliers, the amount billed to LaBar Transportation by Petroleum Suppliers, and the amount paid to Petroleum Suppliers by LaBar Transportation Corporation.

Comparison of invoices to cash flow between primary suppliers, Petroleum Suppliers, Inc. (PSI) and LaBar Transportation Co.

Check Issue Date PSI	Number of checks and check nos. PSI	Amount Paid to Primary Suppliers by PSI	Amount Billed to LTC by PSI	Date of LTC check to PSI	Amount Paid to PSI by LTC	LTC check Number
1	2 3	4	5	6	7	8
081177	3, 101-103	$51,765.61	$54,769.57			
				8/16/77	$40,000.00	8556
				8/17/77	12,000.00	8564
083177	1, 104	11,151.56	11,816.06			
				8/31/77	11,500.00	8633
090977	3, 105-107	35,938.42	37,946.55			
				9/12/77	36,000.00	8719
100677	3, 108-110	48,967.10	55,555.22			
				10/06/77	49,000.00	8891
101177	1, 111	93.07				
110377	4, 112-115	48,898.80	55,604.26			
110477	1, 116	10,020.42	13,860.58			
				11/07/77	60,000.00	9130
113077	6, 117-122	59,596.31	67,439.49			
				12/05/77	60,000.00	9452
120577	1, 123	46,004.19	48,328.15	12/05/77	46,004.19	9453
122977	8, 124-131	75,772.44	89,771.60			
123977	1, 132	40,063.83	47,947.54			
				12/31/77	50,000.00	9581
				01/04/78	65,000.00	9582
012578	6, 133-138	56,129.81	66,656.32			
013078	4, 139-142	82,824.49	114,037.58	01/30/78	70,000.00	97212
				01/31/78	70,000.00	9749
022278	12, 143-155*	123,188.84	150,740.24	02/27/78	90,000.00	
						10102

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The Government had initially sought the admission of an Exhibit 79 which was identical to 79.01 except that it had a ninth column which showed the difference between the amount billed to LaBar Transportation by Petroleum Suppliers and the amount paid by LaBar Transportation to Petroleum Suppliers. The Court excluded that exhibit on the ground that the ninth column was argumentative in that it set forth the Government's position as to the nature of the relationship between the companies, namely that LaBar Transportation paid only enough cash to Petroleum Suppliers to enable Petroleum Suppliers to meet its cash requirements.

The Defendants argued at trial and renew their argument now that Exhibit 79.01 was inaccurate because it shows both cash flow and accounts receivable of Petroleum Suppliers without showing LaBar Transportation's account payable to Petroleum Suppliers and without showing LaBar Transportation Corporation's account receivable from the Postal Service. Thus, according to the Defendants and their expert witness, the schedule failed to give an accurate picture of the business relationship of the companies.

Fed.R.Evid. 1006 permits a summary of voluminous writings which cannot conveniently be examined in court. Government Exhibit 79.01 accurately sets forth the information on which it was based. Moreover, contrary to the Defendants' contentions, it is not unfairly presented. By itself, this schedule shows the dates on which payments were made by Petroleum Suppliers, bills were submitted to LaBar Transportation Corporation, and the dates and amounts of payments by LaBar Transportation Corporation to Petroleum Suppliers. It was proper argument on the part of the Government to suggest to the jury that what was revealed by these transactions were payments from LaBar Transportation to Petroleum Suppliers in amounts just sufficient to permit Petroleum Suppliers to pay its suppliers. The schedule also

accurately reflected the Defendants' contention that the history of payments demonstrated an extension of credit of Petroleum Suppliers to LaBar Transportation. The Court, therefore, cannot conclude that the probative value of the chart, which summarized voluminous records, was substantially outweighed by the prejudice to the Defendants.

The Court's conclusion that Exhibit 79.01 was properly admitted is not effected by the fact that two jurors performed calculations indicating that by the end of 1978 LaBar Transportation owed Petroleum Suppliers in excess of $200,000 or that the prosecutor made the same argument to the jury. The Defendants do not dispute that such is the case; rather, they argue that it was not proper for the jury to be able to discover that fact by the use of Exhibit 79.01 or for the Government to argue from that fact that LaBar Transportation controlled Petroleum Suppliers. The Defendants ably argued their position that the history of payments was consistent with an extension of credit to LaBar Transportation by Petroleum Suppliers. The jury was free to reject that inference and adopt the Government's inference, particularly in light of the facts that Petroleum Suppliers was obtaining its oil on terms requiring payment within 10 days, that it had no other customer, and that it was thinly capitalized. The jury could properly have concluded that Petroleum Suppliers was not in a position to extend credit to LaBar Transportation and that there was no intention on the part of any of the Defendants that the growing account receivable would ever be satisfied. For these reasons, admission of Government Exhibit 79.01 was proper and not a ground for a new trial.

The Defendants argue they are entitled to a new trial because the Court prevented them from using 10 charts in their closing to the jury. Those charts were shown to the Government and the court only several minutes before the defense was to use them.

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Although defense counsel represented that the information contained in the charts was a summary of that previously provided the Government, a representation that the Government now concedes was accurate, the Defendants proposed to use the charts without giving the Government or the Court an opportunity to determine whether they were accurate or representative of the evidence in the case. The Court offered the Defendants a recess and hearing to determine whether the charts were an accurate reflection of the evidence, N.T. Vol. VII at 109, and the Court stated that defense counsel could present pictorially any evidence which they could demonstrate was in the record. Both proposals were rejected by defense counsel. N.T. Vol. VII at 109, 112.

The charts were not permitted to be used in the Defendants' closings because neither the Court nor Government counsel had an opportunity to determine whether they were within the bounds of proper argument. Just as one counsel has a right to object to statements made by opposing counsel in a closing argument because they are clearly unsupported by the facts in the case, it was a reasonable exercise of this Court's discretion to require the Defendants to give the Government the opportunity to determine whether to object or to prepare arguments in opposition to those contained in the charts. The cases cited by the Defendants are not to the contrary.

In United States vs. Parenti, 326 F.Supp. 717, 728-29 (E.D. Pa. 1971), *aff'd* 470 F.2d 1175 (3d Cir. 1972) (per curiam), *cert. denied*, 411 U.S. 965 (1973), the summary charts had been explained in detail by a Government witness during the trial, and both sides had ample opportunity to study the charts. Similarly, in United States vs. Goichman, 407 F.Supp. 980, 998-99 (E.D. Pa.), *aff'd* 547 F.2d 778 (3d Cir. 1976) (per curiam), the charts were permitted because witnesses had established the basis for their use and the charts were cross-referenced to exhibits that had

been received in evidence. The Court had an obligation to insure that the charts were not confusing, misleading, grossly inaccurate, or completely irrelevant. *See* United States vs. Altruda, 224 F.2d 935, 938-39, 942 (2d Cir. 1955). It was, therefore, a reasonable exercise of this Court's discretion to prohibit the use of the charts under the circumstances as they then existed.

Defendants have also failed to show how they were prejudiced by the Court's refusal to permit the use of the charts. The first five charts would have been used to show that payments from the Postal Service to LaBar Transportation were generally unchanged during the period covered by the indictment. The last five charts would have been used to demonstrate the prices billed by Petroleum Suppliers to LaBar Transportation and requested from the Postal Service were merely the beginning point in a process of negotiation, that the Postal Service routinely paid substantially less to LaBar Transportation than it had requested and that the payments were less than the amounts being paid by LaBar Transportation to Petroleum Suppliers.

The Court fails to see how the first group of charts is relevant because it is not probative of any issue in the case whether the Defendants succeeded in their attempt to obtain more compensation than that to which they were entitled.

As to the second group of charts, at no point during the trial did the Defendants seek to base a defense on the proposition that it was permissible to seek compensation in excess of that to which they were entitled because negotiations would inevitably follow and result in a payment of a lower and presumably correct amount. Having been rebuffed in their attempt to use the argument charts, the Defendants failed even to attempt to argue these propositions to the jury. The Court, therefore, cannot determine how that argument may have been adversely affected by the lack

of the charts. Consequently, Defendants cannot now seek a new trial on the ground that the charts were improperly excluded.

The Defendants' final argument in support of their motion for a new trial is that the prosecutor in rebuttal argument improperly argued and implied to the jury that defense counsel were deliberately seeking to avoid the facts of the case. In rebuttal, the Assistant United States Attorney stated:

> [Defense lawyers'] statements are interesting for what they say and they are equally interesting for what they did not say. And this is my recollection: I did not hear anything on how the negotiations in June and July of 1978 could have taken place when there was nothing to negotiate. Was there any attempt to explain that? It appears to me that the defense lawyers avoided the question of the August 9th mailings. . . . It appeared to me that they avoided much of the discussions of the primary suppliers. (N.T. Vol. VII, 191-2).

Although the Defendants objected to this remark at the conclusion of the argument, they did not do so contemporaneously and did not seek a mistrial or a curative instruction. Although the Court could perhaps properly decline to consider the contention further because of the Defendants' failure to seek a mistrial or a curative instruction the Court will not do so because in its view there is nothing improper about the prosecutor's remarks.

In his closing argument, Mr. Skolnik accused Government counsel of "tossing and juggling and shuffling and twisting" the facts of the case to produce a crime. N.T. Vol. VII at 142. He also stated that the Defendants were being prosecuted because the Government did not like the way they did business, N.T. Vol.

VII. at 168-70 and in addition accused Government counsel of distorting the evidence. N.T. Vol. VII at 154. It is the Court's view that Government counsel's remarks, which merely pointed out to the jury that for all their passion defense counsel failed to address certain key factual issues in the case, were entirely proper and showed restraint in light of the tone of some of the defense counsels' closings.

Based on the foregoing, the Court concludes that the Defendants are not entitled to a new trial.

IV. Motion in Arrest of Judgment.

The Defendants' motion in arrest of judgment contends that the indictment fails to allege an offense because a scheme to defraud the Government is not prohibited by 18 U.S.C §1341, and because crimes involving false claims and false statements to the Government must be prosecuted under 18 U.S.C. §§287 and 1001. The Defendants also contend that the indictment fails sufficiently to notify them of the nature of the charges and is not a plain, concise statement of essential facts as required by Fed.R.Crim.P. 7(c)(1) and that the indictment fails to allege an offense by the corporate defendants because it does not charge that the actions of their employees were within the scope of their authority and in the course of employment. The Defendants also contend that the Court was without jurisdiction because venue does not lie in the Williamsport division of the Middle District of Pennsylvania. None of these contentions has any merit. All of the arguments on behalf of the individual defendants, with the exception of the venue argument, were raised in the Defendants' pre-trial motion to dismiss and rejected by the Court in its denial of that motion, United States vs. LaBar, 506 F.Supp. 1267, 1274, 1277 (M.D. Pa. 1981), and the Defendants have not convinced the Court that its earlier decision was erroneous.

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The argument on behalf of the corporate defendants was raised prior to trial and rejected in an unreported order filed January 21, 1981. As the Court there stated, an indictment sufficiently alleges an offense against a corporation if it either alleges that the corporation acted knowingly or absent such an allegation sets forth facts showing a knowing violation, namely an act done by a corporate agent within the scope of his authority and with the intent to benefit the corporation. *See* United States vs. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 205 (3d Cir. 1970), *cert. denied,* 401 U.S. 948 (1971); Standard Oil Company of Texas vs. United States, 307 F.2d 120, 130 (5th Cir. 1962). The indictment in this case alleges that the defendant corporations acted knowingly. In addition, the acts of the individual officers and agents of the Defendant corporations are set forth in the indictment. For these reasons, the Court concludes that the indictment adequately alleges offenses by the corporation defendants.

In their reply brief the Defendants have intensified the attack on the Government's use of the mail fraud statute to punish what the Defendants claim are crimes already punishable under the false claims act, 18 U.S.C. §287 or the false statements act, 18 U.S.C. §1001. For this reason, the Court will address this claim more fully than in its earlier opinion.

The Defendants rest their argument that the indictment fails to allege an offense under 18 U.S.C. §1341 on the Supreme Court's decisions in Busic vs. United States, ____U.S.____, 100 S.Ct. 1747 (1980), and Simpson vs. United States, 435 U.S. 6 (1978), and on an opinion by the United States District Court for the Eastern District of Virginia in United States vs. Computer Sciences Corporation, Criminal No. 80-158-A (March 5, 1981), which in turn relied on *Busic* and *Simpson*. Because this Court concludes that *Busic* and *Simpson* involved issues not applicable to this case, it rejects the Defendants' position.

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Busic and *Simpson* required the Supreme Court to determine the relationship between 18 U.S.C. §924(c), a statute that provides for increased penalties for the use of firearms during the commission of a federal felony, and two other sections of the United States Code that contained their own provisions for enhanced punishment in the event firearms or dangerous weapons were used. In *Simpson*, the other statute was 18 U.S.C. §2113(d), which concerns bank robberies while in *Busic* the other statute was 18 U.S.C. §111, which prohibits assaults on federal officers. In both cases the defendants were convicted of using firearms in the commission of the federal felonies. Busic received an enhanced punishment under §111 and an additional sentence under §924(c). Simpson received an enhanced punishment under §2113(d) as well as an additional sentence under §924(c). In *Simpson* the Supreme Court held that as a matter of statutory construction only one enhanced penalty could be provided and held in *Busic* that the enhancement was governed by the section creating the underlying felony rather than the general enhancement provision of §924(c). The Court did so on the basis of congressional intent in enacting §924(c) as well as principles of statutory construction requiring that ambiguity in criminal statutes be resolved in favor of lenity and the principle that the more specific statute be given precedence over a more general one. Busic vs. United States, ____U.S. at ____, 100 S.Ct. at 1753.

The Court in *Computer Sciences* used this analysis to dismiss mail and wire fraud charges asserted against the defendants when the same conduct, absent the requirement of mailing, would constitute offenses under either 18 U.S.C. §287 or §1001. The Court held as a matter of statutory construction that the more general mail fraud statute had been supplanted insofar as fraudulent claims against the United States were concerned by the false claims act, 18 U.S.C. §287, and the false statements act, 18 U.S.C. §1001. The additional element of mailing was not sufficient to permit the Government to prosecute under the mail

fraud statute because Treasury Department regulations required that the mails be used to send checks to claimants.

What the Defendants' reliance on *Busic* and *Simpson* ignores is the crucial fact that in both cases identical conduct was subject to enhancement under two different statutes. In this case, however, although the defendants seek to trivialize it, the Government was required to prove the use of the mails in furtherance of the scheme to defraud. It is not unreasonable to ascribe to Congress an intent to punish more severely frauds involving use of the mails than other false claims on or false statements to the Government. Moreover, the Defendants have pointed to no legislative history that shows that Congress was concerned of potential overlap of the mail fraud statute and either the false claims act or the false statements act at the time each was passed or that Congress intended to forbid the use of the mail fraud statute when false claims were mailed to the Government as part of a scheme to defraud. *See* United States vs. Weatherspoon, 581 F.2d 595, 599 (7th Cir. 1978). Such cognizance on the part of Congress played a large part in the Supreme Court's determination of legislative intent in *Busic* and *Simpson*. Finally, the Government proved more than that the Defendants submitted false claims to the Postal Service. It proved the Defendants embarked on a scheme actively to conceal from the Postal Service the falsity of the claims.

Because the conduct for which the Defendants have been convicted is not identical to conduct punishable under either 18 U.S.C. §287 or §1001 and because the legislative history surrounding the statutes in question does not show a congressional intent to forbid prosecution under the mail fraud statute, the Court finds the Defendants' arguments based on *Busic* and *Simpson* to be unpersuasive as it does the *Computer Sciences* case also relied on by the Defendants.

Opinion

The Defendants' attack on the venue of the Court is similar to one raised before trial seeking to transfer the trial to Scranton and rejected by the Court in an unreported order of January 29, 1981. The Defendants cite no case in support of their contention that venue for constitutional purposes requires that they be tried in any given division of a district or that the petit jury be drawn from the same geographical division as was the grand jury. This district has no divisions. It is undisputed that the acts giving rise to the indictment took place within the Middle District of Pennsylvania and the trial of that indictment in any part of the District was constitutional. *See* Zicarelli vs. Gray, 543 F.2d 466, 479 (3d Cir. 1976), United States vs. Joyner, 494 F.2d 501, 504-05 (5th Cir.), *cert. denied*, 419 U.S. 995 (1974); Jeffers vs. United States, 451 F.Supp. 1338, 1347 (N.D. Ind. 1978).

Since the Court concludes that the Court had jurisdiction to try the case and that the indictment charged offenses, the motion in arrest of judgment will be denied.

On July 23, 1981, Defendants filed a motion for a new trial. The motion was supported by a brief filed August 3, 1981. As of this time, no brief in opposition to the motion has been filed, nor is one due before August 21, 1981. Accordingly, the motion is not ripe for disposition and will not be addressed at this time.

An appropriate order will be entered.

s/ Muir
MUIR, U.S. District Judge

DATED: August 14, 1981

GOVERNMENT EXHIBIT 1.02 — REGIONAL INSTRUCTIONS — PART 500, TRANSPORTATION, 1008-T-164, #523 DATED SEPTEMBER 27, 1977

HIGHWAY CONTRACTS
ECONOMIC CHANGE PAY ADJUSTMENTS — ADVERTISED CONTRACTS

Filing No. 523

I. AUTHORITY

Section 5005 (b)(1) of Title 39, U.S.C., as enacted by the Postal Reorganization Act, is the authority for adjustment of contract rates.

II. POLICY GUIDELINES

A. The law provides that the Postal Service, with the consent of the holder of an advertised surface or water transportation route, *may adjust* the compensation allowed under that contract for increased or decreased cost resulting from changed conditions occurring during the term of the contract.

B. It is the policy of the Postal Service to allow contractors an adjustment in rate of compensation as provided for in these instructions when changed economic conditions occur over which the contractor has little or no control.

III. ADMINISTRATIVE INTENT

A. These instructions are applicable only to the processing of contractor's request for an adjustment in rate of compensation when changed economic conditions occur.

B. Changed conditions brought about because of significant service changes are to be negotiated with the contractor in advance of the Contracting Officer's ordering the service change. Therefore, significant service changes are not subject to economic cost adjustments.

IV. LIMITATIONS AND RESTRICTIONS ON ADJUSTMENTS

A. Rate of compensation paid the holders of advertised transportation contracts is adjustable only to the extent of the effect of changed conditions occurring during the contract term. Therefore, a change in rate of compensation to correct bid errors or omissions in the contractor's cost statement is not allowable except as provided for in Section 2-406 of the Postal Contracting Manual.

B. Adjustment will not be allowed before the beginning of the 14th accounting period after an initial award of a contract, or the beginning of the 8th accounting period after the effective date of a renewal contract or subcontract. Exceptions are: increases in operating costs resulting from fuel price increases; pre-scheduled increases in wage determination rates or the incorporation of a new wage determination in the contract; changes in service effected under Clause 12, Form 7407, *Basic Transportation Services Contract General Provisions;* enactment of a statute or ordinance; or the adoption of lawful regulations by any Federal, State or local agency. Any adjustments during the first 13 accounting periods of a new contract, or during the first 7 accounting periods of a renewal contract or subcontract are further restricted to those items which could not reasonably have been anticipated at the

time of the bid submission. Adjustment in rate of compensation for fuel price increases will be allowed in accordance with instructions contained in Section VIII of these instructions. Adjustments in rate of compensation for any reason other than those listed above may be made only with the prior written approval of the Director, Transportation Services Office (TSO), Mail Processing Department.

V. INITIATING REQUEST FOR ADJUSTMENT

The contractor must initiate the request for an adjustment in the rate of compensation by completing the appropriate forms as follows:

a. Contractors holding contracts with annual rate of compensation of $20,000 or over, and employing regular service employees in the performance of service required by the contract must complete Form 7463, *Cost Statement — Highway Transportation Contracts.* (See VIII-G for details).

b. Contractors who hold contracts of any amount, but do not employ any regular service employees in the performance of service required by the contract must complete Form 7464, *Cost Statement (Short Form) — Highway Transportation Contracts.*

c. Contractors holding contracts with an annual rate of compensation of less than $20,000, and employing regular service employees in the performance of service required by the contract may complete either Form 7463 or 7464.

Regional Instructions

VI. COMPARATIVE COST STATEMENTS (FORMS 7463 AND 7464)

A. Basic Principles

1. Forms 7463 and 7464 are designed to identify the contractor's operating cost items at the beginning and ending of the period for which an adjustment is requested by the contractor.

2. In cases of suspected fraud, a written report from the region is necessary, accompanied by supporting evidence. In cases where there is evidence the contractor is not paying his employees the compensation shown on Form 7463 or 7464, a complete report must be made to the TSO, Headquarters. This includes cases in which the Department of Labor indicates that a contractor is not paying his employees wages required by the terms of the Service Contract Act.

3. When Form 7463 or 7464 is submitted, it becomes the basis not only for the requested adjustment, but also for comparison with future costs. THEREFORE, IT IS MANDATORY THAT ALL COST ITEMS BE SHOWN ON FORM 7463 OR 7464.

4. Only increased costs applicable to the specific contract services may be considered. When an increase is realized by the contractor from traffic other than mail carried on the same trip(s), any increased cost incurred by the contractor in Items

2 through 10 must be prorated according to percentage of income realized from mail transported.

NOTE: *Do not consider adjustment in contract rate to cover deficiency in income if a bid was based on commingled revenue which did not materialize, or if such revenue was procured through contractor initiative and later lost without any contract revision by Postal Service.*

5. A contractor cannot be told how or when to purchase his supplies and equipment, but he is expected to conduct a reasonably efficient operation.

6. Decreases in cost of specific items due to contractor's initiative will be used to offset increases in other items only to the extent increases were previously granted for these specific items during the contract term.

B. Non-Allowable Increases

1. Increased annual vehicle cost resulting from a contractor's election to replace equipment by purchasing or leasing a larger vehicle than required by the contract.

2. Cost increases for items which were omitted in the original or renewal cost statement.

3. Increased labor cost resulting from a contractor's choice to hire a driver or supervisor in lieu of personal operation during the term of the contract.

4. Rate of pay on emergency contracts.

C. Adjustment Limits

1. Adjustments in rate of compensation for owner-operator route or routes with an annual rate of $20,000 or less (using Form 7464) are limited to an amount that does not exceed the Consumer Price Index (all items) except for fuel, labor costs, and contractor's wages as outlined in Section VIII-H, Item 4-d.

2. For adjustments in rate of compensation for routes other than owner-operator routes (using Form 7463) contractor must provide documented evidence of actual increased costs on those items requiring documentation.

VII. AUTHORITY TO APPROVE ADJUSTMENTS

After review by the Regional Finance Department, the Manager, Transportation Management Office (TMO), is responsible for approving or disapproving all contract pay adjustments covered by this Regional Instruction. One line fuel and general economic cost adjustments filed on Form 7464 will be approved or disapproved without the Regional Finance Department's review. (In all cases where the Regional Finance Department reviews the requested adjustment, a copy of the review will become a part of adjustment file.)

VIII. PROCESSING ADJUSTMENT REQUESTS

A. Questions relating to the interpretation of these instructions at the TMO level will be referred to the Regional General

Manager, Logistics Division, for clarification. Questions arising at the Regional level will be referred to Headquarters.

B. All adjustment requests must be processed so an initial offer may be made to the contractor within 28 calendar days after receipt. The initial offer will be made only on the facts submitted. In complex cases, an interim adjustment may be made. (See Section XII-D.)

C. Upon receipt of contractor's request for an adjustment, the TMO manager will return three copies of the Form 7463 or 7464 to the contractor. Line 1, Column 1 of these forms will be completed by the TMO manager to show the date of bid closing, renewal, subcontract, or date of last approved cost adjustment, whichever is the later.

D. Period of Comparison

The period of comparison for economic pay adjustments will be from the *effective date of the latest economic pay adjustment,* solicitation bid closing, contract renewal, or subcontract, whichever is the latter, to the effective date of the new request, except as noted in specific line item instructions.

E. Verification

Review Form 7463 or 7464 to ensure that all items appearing in column 1 are the approved items and amounts on file as the last approved cost statement. If these items are not identical, they are to be corrected by the TMO.

Regional Instructions

F. Review of Cost Statement

1. Prepare Form 5496, *Adjustment Analysis and Report,* in triplicate to supplement the cost data on Form 7463 or 7464. Form 5496 provides a summary of changes that have occurred. Do not enter data in "Present Date" column if no changes have occurred.

2. After initial review of Form 7463 by the TMO Manager, send the entire file to the regional Finance Department in accordance with Section VII of these instructions. The file will contain:

   a. All forms, correspondence, and documentation concerning the request. (Form 7463 must be dated and signed by the contractor.)

   b. Last economic cost adjustment file (complete file) or copy of cost statement at time of award, renewal, or subcontract.

   c. Copy of current statement of service.

   d. Copy of Form 5443, *Contract Route Statement Schedule and Specifications.*

   e. Form 5496 (original and two copies) completed as outlined in instructions on back of form.

   f. Last negotiated service change cost statement.

Regional Instructions

G. Analysis of Form 7463

Item 1, Fixed and Operational Costs

Line 1A, Column 1.

a. The annual vehicle cost should reflect the sum of depreciation and interest paid on vehicle(s) as shown on last approved cost statement or negotiated service change.

b. The annual cost divided by current scheduled miles will equal rate per mile. An increase in this unit cost (rate per mile) is subject to adjustment only when new (or different) equipment is purchased to use on the route. When contractor changes equipment on the route, the allowable rate per mile increase is limited to percentage change in CPI "All Items" since date of purchase of replaced equipment, bid closing, or subcontract, whichever is the later. Exception: general managers, Logistics Divisions, are authorized to approve an increase in excess of CPI for equipment replacement cost in unusual or unique situations. Complete documentation justifying an exception must be provided by the contractor.

c. Unit cost or rate per mile shown in Column I and Column III should be carried to five decimal places. Approved unit cost, rate per mile, shown in Column III, times scheduled miles of service, will equal approved annual vehicle cost. (No documentation required except when replacement equipment is purchased.)

Regional Instructions

Line 1B. This line includes cost of repairs, repair labor, tires, and other miscellaneous operational cost not carried in other items on this form. The allowable increase in this line item is the amount determined by using procedures outlined in Section IX. (No documentation required.)

Item 2, Taxes. This item should show cost incurred by contractor for personal property tax on vehicles used in providing service required on the route. Documentation in the form of a tax receipt or tax bill is required.

Item 3, Vehicle Registration. This item should show only state and local vehicle registration fees. Any increase in cost incurred by contractor as a result of increased registration fees are allowable when satisfactorily documented.

Item 4, Bond. Cost for bond does not change during the contract term. Therefore, this is not an adjustable item.

Item 5, General Overhead Cost. General overhead should include all management expenses not included in other items. It will include such items as supervision and all related supervisory costs; telephone; office expenses; garage rents; parking fees; bulk fuel handling cost; terminal cost; interest and insurance, except interest and insurance on vehicles, etc. The allowable increase in this line item is the amount determined by using procedures outlined in Section IX.) (No documentation required.)

Item 6, Gasoline and Diesel Fuel.

a. All adjustments for fuel will be based on actual cost per gallon. The contractor must furnish a

certification which reflects cost of fuel purchased for use on the route. This certification will be a statement showing names and locations of suppliers of fuel and average price paid per gallon for fuel purchased during the prior month. If fuel was purchased from more than one supplier, the contractor must specify the number of gallons of fuel purchased from each supplier for use on the route.

b. Increases or decreases for the line item fuel cost will be based on the allowable gallons, as reflected on the last approved cost statement, times average cost per gallon for the previous month as shown on the certification.

c. Contractors may file for a fuel adjustment in the form of a "one line item request" when the average price of fuel for the immediate preceding month increases by 3.5% more than the unit cost allowable in the last approved cost statement. These "one line item" requests must be accompanied by a certification statement as required above.

d. The TMO manager may require a contractor to provide actual documentation of fuel cost when deemed necessary or appropriate.

Item 7, Oil. The adjustment for increased cost of oil will be based on number of miles per unit as shown on bid subcontract or last approved cost statement. An increase in number of units used will be allowed only to the extent of additional oil required in performing service added in an insignificant service order. Allowable increase or

decrease in cost of oil will be adjusted to reflect actual per unit cost incurred by the contractor for the last month prior to the request for adjustment.

Item 8, Insurance. This item is to reflect cost of insurance on vehicles used in the performance of service on the route. (Insurance coverage carried by contractors for terminal facilities, key-man insurance coverage, etc., should be included in General Overhead Cost, Item 5.) An adjustment will be allowed only when there is an increase in cost of "same coverage" as reflected in last approved cost statement. Cost of additional coverage purchased at the option of contractor is not allowable. Also, no adjustment will be allowed for the higher cost of "assigned risk" insurance caused by the contractor's high accident rate.

Item 9, Miscellaneous Road Taxes. This item should show cost incurred by contractor for federal highway use tax, state highway use tax, state mileage tax, and state road tax. Any increase in cost incurred by contractor as a result of imposition of additional taxes by state or federal government is allowable.

Item 10, Tolls. Increased cost to the contractor for toll fees is allowable when fees are increased or newly added.

Item 11, Total Fixed and Operational Cost. Sum of Items 1 through 10.

Item 12 and 13, Straight Time and Overtime.

a. An increase in contractor's rate of compensation may be adjusted to offset increased driver cost resulting from applicability of new "wage

determinations," employee/employer collective bargaining agreement or other increased cost of labor (drivers) resulting from necessary salary adjustments by contractor to ensure employment of qualified and reliable drivers.

b. It is not possible to establish minimum or maximum allowable percentage increases, but it is expected that increases be restricted to an amount that would maintain a reasonable and competitive rate for service provided, and at the same time allow contractor to pay his employees a reasonable salary. The percentage increases reflected in successive annual issuances of wage determinations may be used as a guideline for contractors who do not have collective bargaining agreements with their employees.

c. The amount of allowable adjustment for this item will be determined by multiplying the allowable hours times hourly straight time and overtime rate.

d. The allowable hours are those hours shown on the cost statement of original bid, renewal contract, subcontract, last approved adjustment, or negotiated service change, whichever is the later, plus an increase in hours necessitated by insignificant service change orders, new or revised statutes, and other changed conditions affecting hours required to perform the service.

Likewise, insignificant service change orders, new or revised statutes, or other changed conditions which enable the contractor to reduce paid hours

will reduce the allowable hours and offset allowable increases in other items.

e. Payroll journals which reflect hours paid and gross amount paid employees will normally constitute sufficient documentation to support increased cost for these items. If the contractor has a collective bargaining agreement with his employees, that document should normally be sufficient to document employees' salary scale. The incorporation of a new wage determination in a contract constitutes a requirement on the part of the contractor to pay, as a minimum, the new wage rate. Therefore, a request for adjustment when a new wage determination is incorporated in a contract should be allowed without immediate further documentation, but continuation of the increased rate will be subject to the contractor's furnishing copies of payroll journals within 90 days after effective date of increased wage rate.

f. Terminal employees' or supervisors' wages are to be included in Item 1.B or Item 5, and, therefore, are not to be considered in this item.

Item 14, Payroll Taxes.

a. This item should reflect cost incurred by contractor for Federal or state payroll taxes paid on *salaries of drivers*. Contractor's rate of compensation may be adjusted to offset any increased cost incurred by the contractor for payroll taxes.

b. Social Security tax paid by employer is based on 5.85% of each employee's earnings up to $16,500

annually. Workmens' Compensation tax, and Federal and state unemployment compensation tax are based on the experience factor of the employer, and, therefore, cost may vary from year to year and contractor to contractor.

c. Contractor must furnish adequate documentation to support cost of Workmens' Compensation and Federal and state unemployment compensation tax when a request for an economic cost adjustment is filed.

d. Self-employment tax paid by the contractor is not an adjustable item.

Item 15, Fringe Benefits. This item should show the cost of employee health and welfare, pension benefits, vacations, and holidays, if applicable, based on the number of employees shown in Items 12 and 13. Allow the *increased cost* incurred by the contractor for fringe benefits resulting from new wage determination or negotiated employee agreements. Fringe benefits are computed on the basis of hours paid employees, up to a maximum of 8 hours per day or 40 hours per week, unless specified otherwise in a collective bargaining agreement. In cases where an employee does not perform 40 hours per week, the fringe benefits will be prorated according to the number of hours of work performed.

Item 16, Total Operational Labor Cost. Item 16 total is the sum of Items 12 through 15.

Item 17, Contractor's Wages. The allowable increase in this line item is the amount determined by using procedures outlined in Section IX. (No documentation required.)

Regional Instructions

Item 18, Total Cost. Item 18 is the sum of Items 11, 16, and 17.

Item 19, Return on Investment. Return on investment may be adjusted only when vehicles used on a route are replaced, and an increase is allowable in Line 1.A. The allowable increase in return on investment is limited to 10% of the increase allowable in Line 1.A.

Item 20, Contract Rate. This item reflects sum of amounts in Items 18 and 19.

Item 21, Amount of Increase Requested. This item should be the difference between Column 1 and Column 2 of Item 20.

H. Analysis of Form 7464

Item 1, Operational Cost. An increase in contractor's rate of compensation will be allowed, to offset increased operational cost resulting from insignificant service change orders or other changed service conditions or requirements. Request for adjustment in compensation based on changed economic conditions will be allowed. The allowable increase is determined by multiplying the rate per mile for this item as determined from last approved cost statement times percentage increase in CPI "All Items" since bid closing, renewal, subcontract or last economic cost adjustment, whichever is the later.

Item 2, Fuel.

a. Contractors who employ regular service employees, and whose annual contract rate is less than $20,000,

may request fuel adjustments on Form 7464. Certification as to cost of fuel must be furnished by the contractor. (See Section VIII-G, Item 6.)

b. Contractors who do not employ regular service employees (owner-operator) may be allowed fuel adjustments based on the following instructions:

Allowable increase for fuel adjustment request will be based on percentage change in CPI index for regular gasoline as reflected in the Labor Department's monthly report for 23 selected areas. A contractor will be allowed an increase or reduction equal to an amount reflected by percentage index change since date of last adjustment for fuel. This request must be filed as a general economic adjustment including other items, or when the applicable fuel index changes by at least 3.5% from the index used to compute last allowable fuel adjustment.

Area Index	Use to Adjust Owner-Operator Routes in States Indicated
CENTRAL REGION	
Cleveland	OH routes 440...thru 447...
Cincinnati	OH routes 430...thru 439...
	OH routes 448...thru 458...
	KY

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	IN
Chicago	IL
Detroit	MI
Milwaukee	WI
Minneapolis/St. Paul	MN
	IA
	ND
	SD
St. Louis	MO routes 630...thru 639...
	MO routes 650...thru 658...
Kansas City	MO routes 640...thru 648...
	KS
	NE

WESTERN REGION

Seattle	WA
	OR
	ID
San Francisco	NV
	UT
	CA routes 936...thru 961...
Los Angeles	CA routes 900...thru 918...
	CA routes 922...thru 935...
	AZ

San Diego	CA	routes 920...thru 921...
Dallas	NM	
	CO	
Honolulu	HI	
Minneapolis/St. Paul	MT	
	WY	

SOUTHERN REGION

Atlanta	GA	
	NC	
	SC	
	TN	
	AL	
	MS	
	FL	
Dallas	OK	
	AR	
	TX	except routes 770...thru 779...
Houston	TX	routes 770...thru 779..., and
	LA	

EASTERN REGION

Buffalo	NY	State routes 130...thru 149...
Philadelphia	NJ	routes 080...thru 087...
	PA	170...thru 194...DE

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Pittsburgh	PA 150...thru 169...routes WV
Baltimore	MD
Washington	DC and VA

NORTHEAST REGION

Boston	ME NH VT MA RI CT
New York,	NJ routes 070...thru 079..., and
No. East, NJ	NJ routes 088...thru 089 NY routes 100...thru 129

Inasmuch as there is not a published index to reflect gasoline cost changes in Puerto Rico, Virgin Islands, Alaska, Guam and Trust Territories, owner-operator contractors in those areas may apply for fuel adjustments in the same manner as non-owner operator contractors.

Item 3, Payroll Cost.

a. TMO managers are authorized to approve one-time payments to contractors when illness forces the contractor to employ a driver temporarily. Any reasonable increase over the hourly rate the contractor was receiving for his own driving time may be approved. The one-time payment is limited

to an amount of increased cost incurred for a time period not exceeding 30 days.

b. Except as outlined in a., any allowable increase in payroll cost must be documented and such increased costs are to be allowed consistent with instructions contained in Sections VI-B-3 and VIII-G, Items 12 and 13.

Item 4, Contractor's Wages — Personal Driving.

a. The allowable increase in contractor's wages granted solely for changed economic conditions is limited to amount shown on last approved cost statement times percentage increase in CPI "All Items" since contract award, renewal, subcontract or last approved economic cost adjustment, whichever is the later.

b. Adjustment in rate of compensation to cover changed service conditions requiring additional hours on box delivery routes will be allowed to the extent of additional hours required of the contractor to process and deliver mail to the added boxes.

c. The amount of increase to be allowed will be determined by multiplying the hourly rate times the appropriate CPI multiplier, times the allowable hours shown on last approved cost statement or adjusted hours allowable as outlined in the preceding paragraph.

d. Adjustment in contractor's wages may be increased in all cases to allow contractor as a minimum the

"minimum wages" as outlined in the Fair Labor Standard Act (as amended), provided operational and fuel cost are properly allocated and not considered excessive.

Item 5, Contract Rate. This item should be the sum of Items 1 through 4.

Item 6, Requested Annual Rate. Self-explanatory.

Item 8, Amount of Increase Requested. This amount should reflect results of Item 5, Column 1, subtracted from Item 6, Column 2.

I. Last Approved Cost Statement

This is the most recent Form 7463 or 7464, which outlines the line item allocation of cost. This could be the cost statement at time of contract award, renewal, subcontract, an economic cost adjustment, or negotiated service change, whichever is the later. (Every negotiated service change must have a cost statement prepared to add or subtract the amount from each line item affected by the service change.)

IX. CONSUMER PRICE INDEX

A. The Surface Transportation Division, Mail Processing Department, will publish Consumer Price Index (CPI) changes for "All Items" and "Regular Gasoline" monthly.

B. The contractor will be allowed an amount equal to the percentage change in the CPI for those items adjustable by CPI changes. The percentage change will be determined as follows:

Regional Instructions

Divide the CPI of the month prior to the effective date of adjustment by CPI for the month prior to the start of the comparison period. The results of this division multiplied by the item amount shown in Column III of last approved cost statement will be the allowable adjusted amount for that line item. Example: effective date of adjustment June 18, 1977, following comparison period started December 4, 1977. May 1977 CPI (180.6) divided by November CPI (173.8) = (1.03913); (1.03913) times last approved line item cost ($2,641.23) = ($2,744.58) new allowable amount.

X. CHANGES WHILE ADJUSTMENT IS PENDING

A. If a route is subcontracted while a contractor's adjustment is pending, any adjustment allowable will be allowed to the subcontractor.

B. If a contractor dies before completion of a pending adjustment, the estate of the deceased contractor or next of kin should be given an opportunity to complete the adjustment case. Any adjustment thus allowed will be allowed to the subcontractor if the route is subcontracted.

C. If a contractor defaults or is removed while an adjustment is pending, process the adjustment if possible so that the surety in charge or subcontractor will be allowed the increased rate.

XI. EFFECTIVE DATE

A. Adjustments solely for economic reasons, including contractor's wages, may not be granted more frequently than every seven accounting periods (196 days).

Regional Instructions

B. The effective date of an adjustment will be on the first day of the accounting period in which completed Form 7463 or 7464 is received, except as noted in C and D below.

C. One line fuel adjustment may be allowed owner-operators effective at the beginning of the accounting period in the month following a 3.5% change in regular gasoline price index. For non-owner operated routes, an adjustment may be allowed at the beginning of the first accounting period in the month following a 3.5% change in average cost per gallon a contractor pays for fuel. This request for adjustment must be filed within two months following the month in which a 3.5% change is reflected in the index (for owner-operators) or a 3.5% change in actual cost for non-owner operators, the effective date will be at the beginning of the accounting period in which the adjustment is filed.

D. Request for adjustment in rate of compensation for increased cost contractor incurs because of new wage determinations, new labor contracts, or new or revised statutes will be effective on the date the contractor actually incurs these increased costs, provided the adjustment request is received within 60 days after the increased costs are incurred. If the adjustment request is not received within 60 days, the effective date will be the first day of the accounting period in which the request is received.

E. Adjustments for a combination of any or all reasons cited above may be made effective on different dates as prescribed in those sections.

Regional Instructions

XII. COMPLETING ACTION

A. Approval

After Form 5496 has been completed and approved, the Transportation Management Office will:

1. Issue order on Form 7440, *Contract Route Service Order,* only when the full amount of request is approved without making an offer on Form 5492, *Request For Pay Adjustment Highway Transportation Contracts.* Enclose a copy of Form 7463 or 7464 when order is furnished to the contractor. Return all original documents to the contractor.

2. Issue offer to the contractor on Form 5492 when amount approved is less than requested. Furnish explanation of evaluation, enclosing copy of Form 7463 or 7464 showing amount allowable. Upon acceptance, issue order on Form 7440. Return all original documents to the contractor.

3. The 28-day clause for reply to an offer is intended to prevent excessive retroactivity. If no reply is received during this period and an acceptable explanation is not furnished, a new effective date will be established based on the date of the contractor's reply.

NOTE. *One copy of Form 5496 will be made a part of the case file.* The other copies will be sent to the regional Finance Department

and Postal Data Center with Form 7440 authorizing the adjustment.

B. Denial

When an adjustment request is denied, advise the contractor of the reason for this action. A detailed explanation is mandatory.

C. Protest

1. When a contractor makes a request for adjustment in compensation for economic reasons, and the Contracting Officer's offer is less than that requested, the Contracting Officer will advise the contractor in writing of each item disallowed in whole or part and the specific reasons for such disallowance. If the offer for adjustment is rejected by the contractor, the case may be appealed to the next higher level of contracting authority. The contractor will address the appeal, in writing, to the next higher level contracting authority by sending it through the Contracting Officer. The contractor must specify exactly what disallowed items are subject to appeal and the reasons why he claims the Contracting Officer's disallowance of these items was wrong or was arbitrary and capricious in view of the evidence submitted to support such items.

2. The Contracting Officer will review the appeal, attach the complete adjustment file with the supporting reasons for rejecting the contractor's requested adjustment and include his recommendation as to the final action to be taken.

The Contracting Officer will forward the appeal and attached file to the next higher level contracting authority within 10 days after receipt of the appeal.

3. Following review of the file, the next higher level contracting authority will render a written decision with the reasons therefor, and return the complete file to the contracting officer within 30 working days.

4. The Contracting Officer within 10 days after receipt of the final decision will advise the contractor, in writing, of the decision, stating reasons therefor. In so informing the contractor, the Contracting Officer will include the following statement:

> "This decision is final. Your attention is invited to Clause 2. C, Form 7407, Basic Transportation Services Contract General Provisions."

D. Interim Payments

a. The TMO manager may approve a contractor's request for an interim adjustment when he concludes that there will be a delay in processing the contractor's request.

b. Qualify all interim adjustments with a statement on Form 7440 that the amount is not final and subject to modification after final approval of the adjustment request.

Regional Instructions

XIII. FORM 5479, CONTRACT ADJUSTMENTS - ACCOUNTING PERIOD REPORT

A. The Transportation Management Office will prepare separate listings at the end of the third week of each accounting period by contract number in the order received under the headings, "Cases On Hand At Beginning of A/P," and "New Cases" at the beginning of each accounting period.

B. Enter increase for wage adjustment approved, adjustment amount, and order number for each individually completed case as cases are completed.

C. Report any denial or withdrawal in the "Total Approved Adjustment" column for the individual case involved.

D. Total all columns under each listing where applicable and distribute the report as follows:

Original	Regional Controller
Second and Third Copies	General Manager, Logistics Division, Region
Fourth copy	Postal Data Center
Fifth copy	File copy

E. The regional office will summarize the TMO's reports and forward the detail and summary report to General Manager, Surface Transportation Division, Washington, DC. The summary report must contain the following information:

Regional Instructions

1. Total number of cases on hand at beginning of A/P.

2. Number of new cases received during the A/P.

3. Number of cases approved during the A/P. (Note: Approved means with orders written and signed.)

4. Amount of allowance approved during the A/P.

5. Wage portion of approved allowance during A/P.

XIV. EFFECTIVE DATE

All requests for adjustments in rate of compensation received on and after July 1, 1977, will be processed in accordance with these instructions.

XV. RESCISSION

These instructions recind Regional Instruction 876-T-158, dated January 2, 1976, Filing No. 523, and Regional Instruction 949-T-162 dated October 29, 1976, Filing No. 523 Amend. #1.

s/ E. V. Dorsey
Senior Assistant Postmaster General
Operations

OFFICE OF TRANSPORTATION SERVICES BULLETIN, NO. 81-4 DATED FEBRUARY 25, 1981

OFFICE OF TRANSPORTATION SERVICES BULLETIN

Bulletin No. 81-4 U.S. POSTAL SERVICE Date 2/25/81

FUEL ADJUSTMENTS

A number of contractors or companies holding highway mail transportation contracts purchase fuel from a business enterprise owned (or substantially controlled) by principles holding the transportation contracts. Such relationships present special dangers of excessive and unjustified costs possibly being passed on to the Postal Service, unless the contracting officer is aware of and is vigilant in his examination of such arrangements or relationships.

This is not to imply that such relationships are illegal or improper. In fact, most such relationships provide mutual advantages; namely, such arrangements result in overall lower contract costs and at the same time, enables the bidder/contractor to be successful in the competitive bidding process. The danger arises when the contractor uses this relationship for success in bidding and then uses the same or subsequently established relationship to escalate the contract rate by means of purchasing fuel from the controlled company at increased prices influenced by other than market conditions.

Basic policy underlying the highway contract cost adjustment instructions for fuel contemplate allowing contractors rate increases to offset increases in costs they experience in "arms-length" purchases of fuel — and then, only to the extent that such increased costs are beyond the control of the contractor.

In processing highway contractor's fuel cost adjustment requests, contracting officers are hereby instructed to secure full disclosure

of any common interest supplier/user relationship that they have reason to believe exists before allowing adjustments in contract rates due to fuel costs.

ALL CONTRACTING OFFICERS

All contracting officers must certify for payment of damage claims submitted by contractors, or contractor's representatives, within 30 days from the date of receipts of the claim. The contractor or his representative will be required to certify that damage did not occur prior to delivery into the custody of the U.S. Postal Service, and shall include the following citation:

> "U.S. Code, Title 18 (Crimes and Criminal Procedure), Section 1001, makes it a criminal offense to make a willfully false statement or representation herein."

DEATH OF A CONTRACTOR

The attention of contracting officers is directed to the fact that pending publication in the Postal Contracting Manual, procedures for administering highway contract routes after the death of, or a court determination of a contractor's incompetence, were published in Postal Bulletin 21249 dated June 12, 1980.

Several interesting provisions are:

> 1) The representative of the estate may elect to continue to operate the route with permission from the contracting officer.
>
> 2) If the administrator or executor is performing the service on the date of expiration of the contract,

the contract may not be renewed and the service must be resolicited. If next of kin (surviving spouse or child) is performing the service, the contract may be renewed in the name of that individual.

3) Representatives of the estate authorized to operate the route who desire to sublet the contract may do so in accordance with Section 19-317, Postal Contracting Manual and permission of the contract officer.

STATE BOUNDARIES

Management Instruction PO-410-80-6 established a policy whereby, "all delivery areas must be realigned to conform with state boundaries." In keeping with the policy all contract box delivery routes which operate in two or more states must be reviewed to ascertain that this policy is being followed.

SOLICITATIONS - TEAM DRIVERS

Reference to posting of solicitation for 60 days in paragraph 4 of our letter of October 9, 1979, Solicitations - Team Drivers, is rescinded. See Section 19-130 (c) Postal Contracting Manual for appropriate instructions for posting of solicitations.

James E. Orlando, Director
Office of Transportation Services
Mail Processing Department

LETTER OF MAY 14, 1973 FROM JAMES R. STRONG, ASSISTANT REGIONAL COUNSEL

020-JRS:sjy

HTC #72012 and #72016

May 14, 1973
Log #6493
File 12-K-8

Reference is made to your memorandum of May 10, 1973 regarding the captioned subject.

You suspect that a star route contractor has an interest in two corporations from which he rents trucks and buys gasoline. Recently, the corporation supplying gasoline has increased their prices by 2¢ per gallon, and the contractor has requested a public law adjustment upward based on this increase. You ask if we are obligated to allow this request for an adjustment.

A corporation is a legal entity and is considered to be a separate person from individuals and other corporations, therefore, a corporation can legally contract with one of its shareholders.

It is possible that the prices charged by the corporation to the individual contractor may not be a competitive price; therefore, pains should be taken to verify the market price of the product being sold in such cases.

s/ James R. Strong
James R. Strong
Assistant Regional Counsel

Letter

Attachment - File

cc:
Assistant General Counsel
Transportation Division
Law Department - Room 4226
United States Postal Service
Washington, D.C. 20260